Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

RAYMOND W. KELLY, in his official capacity as Commissioner of the New York City Police Department, PROPERTY CLERK, NEW YORK CITY POLICE DEPARTMENT, and THE CITY OF NEW YORK,

Petitioners,

-against-

VALERIE KRIMSTOCK, CHARLES FLATOW, ISMAEL DELAPAZ, CLARENCE WALTERS, JAMES WEBB, MICHAEL ZURLO, and SANDRA JONES, individually and on behalf of all other persons similarly situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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January 23, 2003

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105 pp

QUESTION PRESENTED

By holding that the City's forfeiture procedures were constitutionally infirm, because the 25-day time period allowable for the City's commencement of a forfeiture proceeding following a claimant's demand for the return of his or her property was unreasonable, did the United States Court of Appeals for the Second Circuit thereby create a novel, prompt, post-seizure probable cause/"probable validity" hearing in conflict with:

(1) this Court's controlling decisions in United States v. $8,850, 461 U.S. 555 (1983), which held that an 18-month delay in the government's commencement of a civil forfeiture proceeding was not unreasonable, and in United States v. Von Neumann, 474 U.S. 242 (1986), which held that the forfeiture proceeding, and nothing more, provided the post-seizure hearing required by due process; and

(2) other circuit opinions, including the Second Circuit, which properly rely on $8,850 and Von Neumann in determining whether the delay in filing a forfeiture proceeding violates due process and, thus, warrants an earlier post-seizure hearing in addition to a civil forfeiture proceeding?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit, from which petitioners seek certiorari, was entered on September 18, 2002. The opinion is reported at 306 F.3d 40, 2002 U.S. App. LEXIS 19182, and appears in the Appendix at A1-51. Petitioners filed a petition for rehearing en banc from the September 18, 2002 opinion. The Second Circuit denied that petition,

which denial was entered on October 28, 2002. That order is not published in the Federal Reporter. It appears in the Appendix at A68-69. The November 13, 2000 Opinion and Order (one paper) of the United States District Court for the Southern District of New York is not published in the Federal Supplement, but appears at 2000 U.S. Dist. LEXIS 16444, and is printed in the Appendix at A52-65. The District Court issued its judgment dated November 15, 2000. That judgment is also not reported, but is printed in the Appendix at A66-67.

JURISDICTION

The Second Circuit issued its judgment on September 18, 2002 . The Second Circuit issued an order denying rehearing en banc on October 28, 2002 (A68-69). This Court has jurisdiction to review this judgment under 28 U.S.C. §1254.

STATUTORY PROVISIONS

The text of the following pertinent constitutional provisions, statutes and rules may be found in the Appendix at A70-76.

United States Constitution

Fourth Amendment

Fourteenth Amendment

United States Code

Title 42, Section 1983 Civil action for deprivation of rights

Administrative Code of the City of New York

Title 14, Chapter 1, Section 14-140 Property Clerk

Rules of the City of New York

Title 38, Chapter 12, Subchapter B, Section 12-36 Property Clerk Forfeiture Proceedings

STATEMENT OF THE CASE

A. Nature of Case

In this civil rights, putative class action lawsuit brought pursuant to 42 U.S.C. §1983, respondents, Valerie Krimstock ("Krimstock"), Charles Flatow ("Flatow"), Ismael Delapaz ("Delapaz"), Clarence Walters ("Walters"), James Webb ("Webb"), Michael Zurlo ("Zurlo") and Sandra Jones ("Jones") (collectively, "plaintiffs"), seek class certification under Fed. R. Civ. P. 23(a) and 23(b)(2) and declaratory and injunctive relief. Plaintiffs, whose cars were seized by petitioner, the New York City Police Department ("the Police Department"), allege that the forfeiture procedures of petitioners, Raymond W. Kelly, as Commissioner of the Police Department, the Property Clerk of the Police Department ("the Property Clerk"), the Police Department and the City of New York (collectively, "the City"), violate the Due Process Clause of the Fourteenth Amendment. Plaintiffs contend that those persons whose cars are seized by the police and held for forfeiture should receive a prompt, post-seizure hearing in which they may challenge the legitimacy and necessity of the continued impoundment of their vehicles during the pendency of the forfeiture case.

B. Statement of Relevant Facts

The seven named plaintiffs are individuals whose vehicles were seized by the Police Department during an arrest, impounded and held by the Property Clerk for forfeiture, because they were used in furtherance of a crime. Krimstock, Flatow, Delapaz, Walters, Webb and Zurlo were arrested for Driving While Intoxicated

("DWI"). Jones, although the owner of the vehicle, was not driving the car at the time it was seized. Jones had lent her van to her estranged husband who was arrested and charged with cocaine and weapons possession.

Each individual, except Jones, pled guilty to Vehicle and Traffic Law section 1192(1), Driving While Impaired. Jones' husband was convicted of a prior, unrelated grand larceny charge and sentenced to prison.

The Property Clerk commenced civil forfeiture proceedings against the seven named plaintiffs. The criminal proceedings in the cases of Krimstock, Flatow and Webb were still pending at the time the forfeiture proceedings were commenced, while the criminal cases for Delapaz, Walters, Zurlo and Jones' husband had all terminated before the forfeiture complaints were filed.

C. Federal Jurisdiction of District Court

The District Court had jurisdiction of the original action herein pursuant to 42 U.S.C. §1983, the Fourteenth Amendment to the United States Constitution, and by virtue of 28 U.S.C. §1331.

D. District Court's Opinion and Order

Simultaneously with their class action complaint, plaintiffs moved for a preliminary injunction pursuant to Fed. R. Civ. P. 65. Plaintiffs argued that the preliminary injunction they sought, returning the seized vehicle to the owner during the pendency of the forfeiture litigation if the owner did not receive a prompt, post-seizure hearing, was necessary, because they had suffered and continued to suffer irreparable harm in that they were not given an opportunity to address the merits of their cases and dispute any factual issues in a timely fashion. Plaintiffs contended that "deprivation of one's automobile in modern society is almost per se irreparable harm."

The City thereafter cross-moved to dismiss plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(6).

In its Opinion and Order (one paper) dated November 13, 2000 dismissing plaintiffs' complaint and finding that the current forfeiture proceedings comported with due process requirements, the District Court held, inter alia, that the case on which plaintiffs relied, Lee v. Thornton, 538 F.2d 27 (2d Cir. 1976) (the Second Circuit Court of Appeals holding, in the context of Customs violations, that actions on petitions for remissions or mitigation be taken within 24 hours and that, within 72 hours, there be held a probable cause hearing if the petition was not granted in full), had been implicitly overruled by two subsequent cases of this Court involving forfeitures and violations of the Customs laws (A60). For this proposition, the Court cited United States v. $8,850, 461 U.S. 555, 564-569 (1983) (this Court analogizing the issue of when the government's delay in commencing a civil forfeiture proceeding violates due process to the issue of when the government's delay in commencing a trial violates one's right to a speedy trial and holding that Customs' 18-month delay in initiating a forfeiture procedure was reasonable) and United States v. Von Neumann, 474 U.S. 242, 249 (1986) (this Court ruling that "[i]mplicit in this Court's discussion of timeliness in *$8,850* was the view that a forfeiture proceeding, without more, provides the postseizure hearing required by due process . . .") (A60-62).[1]

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[1] In situations where property is seized for violation of the Customs laws, the Secretary of the Treasury, upon petition by the claimant, has the authority to mitigate the penalties and fines or remit the forfeiture.

Recognizing, however, that the federal Customs cases presented different factual scenarios than those presented in this state forfeiture proceeding case, the District Court then went on to determine if the facts here warranted providing plaintiffs with a prompt, post-seizure probable cause hearing (A62). Relying on the three-part balancing test outlined in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), to consider whether due process required an additional safeguard in this case, the Court concluded that it did not (A62-64).

The District Court first held that the private interest affected by the Police Department's actions was a person's use of his or her vehicle, which, in this case, was not as great as when Customs' officials seize a vehicle at a remote border site where public transportation is not abundant (A63).

Second, the District Court ruled that, as in the Customs cases, in this case, a probable cause arrest reduces the risk of erroneous deprivation of a person's interest in the vehicle (A63). The Court noted that plaintiffs failed to establish that the probable cause arrests in these drunk driving cases were unreliable nor did they suggest that a probable cause hearing would be more valuable here than in, for example, a Customs case (A63).

Finally, the District Court held that the government's interest, in both the Customs cases and in the civil forfeiture cases, was to supplement law enforcement (A64). In addition, the Court noted that the cost of conducting probable cause hearings in civil forfeiture cases would be "far more burdensome" than in the Customs cases, since plaintiffs had pointed out that the Police Department had seized 1,162 vehicles from February to

November 1999 and that the "class" is increasing daily (A64).[2]

E. Plaintiffs Notice of Appeal

On November 15, 2000, the Southern District of New York issued its judgment (A66-67). Plaintiffs filed a Notice of Appeal dated November 17, 2000.

F. The Opinion of the United States Court of Appeals for the Second Circuit

By opinion entered September 18, 2002, the Second Circuit vacated the judgment of the District Court and remanded the matter with instructions for further proceedings for all parties and the Court to redress the constitutional violations (A51).

The Second Circuit held that the intermediate deprivation between the warrantless seizure of cars by police and the ultimate resolution of the forfeiture action, which gap the Court believed lasted months or sometimes years without any prompt hearing, was what rendered the City's forfeiture procedures constitutionally infirm (A10). The Court held that, in light of the dictates of the Fourth and Fourteenth Amendments, "in the absence of a showing that continued impoundment constitutes a valid deprivation, seized vehicles must be released during the pendency of civil proceedings" (A10).

The Fourth Amendment Analysis

In that regard, the Second Circuit held that due process required that the party whose property was taken be given an opportunity for some kind of hearing at which the "probable validity" of the deprivation must be shown

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[2] In dismissing plaintiffs' complaint, the District Court did not need to rule on plaintiffs' request for class certification.

(A11). The Circuit treated such "probable validity" as a "comprehensive due process concept that includes the City's probable cause for initially seizing vehicles," recognizing that the legality of the seizure is a "subset" of the larger due process question of the legitimacy of the continued retention of the vehicle during the pendency of the forfeiture proceeding (A12-13).

The Second Circuit continued that, even though this Court has not required that a probable cause hearing be held after a warrantless seizure and before a forfeiture trial, many of our laws, such as the federal civil forfeiture scheme, are so fashioned (A14). Although recognizing that the risk of illegal seizure in the context of a DWI arrest is reduced, the Circuit believed, contrary to the District Court, that a warrantless arrest is insufficient by itself to ensure the legality of the initial seizure (A15). Since some risk of an erroneous seizure still exists, the Circuit noted that, without a prompt review by a neutral fact-finder, "grave" Fourth Amendment concerns remained regarding the inquiry into probable cause, which could take months or years before the civil forfeiture proceeding takes place (A14-15). The Circuit added that such Fourth Amendment concerns were heightened by the fact that the City has a direct pecuniary interest in the outcome of the civil forfeiture proceeding (A15).

The Fourteenth Amendment Analysis

The Second Circuit next analyzed the case in terms of the Fourteenth Amendment and took issue with the District Court having "collapsed the separate issues of probable cause and due process into a single analysis" by using Mathews, 424 U.S. 319 and the $8,850, 461 U.S. 555, speedy trial test (A18-19). The Circuit noted that the issues of a speedy trial and a prompt retention hearing are not "parallel" since there are less restrictive methods for protecting the City's interests in the vehicle (A19). The

Circuit held that "to say that the forfeiture proceeding, which often occurs more than a year after a vehicle's seizure, represents a meaningful opportunity to be heard at a meaningful time on the issue of continued impoundment is to stretch the sense of that venerable phrase to the breaking point" (A19). Thus, the Circuit held that plaintiffs have a right under the Fourteenth Amendment to ask the City to justify its retention of the vehicles during the pendency of the forfeiture proceedings and to do so early after the seizure so as to minimize "any arbitrary or mistaken encroachment upon" their use and possession of their property (A20).

The Second Circuit highlighted that its concern that plaintiffs be given a prompt post-seizure hearing to challenge the propriety of the City's continued retention of their vehicles was heightened by "special due process concerns" here such as (1) the "temporal gap" between seizure and the forfeiture proceedings; (2) the inability of innocent owners to promptly challenge the City's retention of their vehicles; and (3) the inadequacy of other remedies for providing prompt post-seizure review (A20-21).

With regard to the temporal gap, the Second Circuit compared the City's forfeiture procedure, which permits the City to commence a forfeiture proceeding within 25 days of a claimant's demand but which hearing is not actually held until months or years later, with that of other states, which hold hearings in a short period of time, such as 30 days after the seizure (A21-24). The Circuit held that the City's procedures do not contain procedural safeguards, such as the posting of a bond, to assist persons who are adversely affected by a seizure and retention of property (A23).

Respecting the problem of innocent owners, the Second Circuit noted that the seizure provision of the Administrative Code of the City of New York authorizes

the Property Clerk to take all property suspected of having been used as a means of committing a crime without regard to whether the owner of that property who took no part in the crime permitted the property to be used as an instrumentality of a crime (A26). This, the Circuit held, raised substantial constitutional concerns because of the great risk of erroneous deprivation (A26-27).

With respect to other possible remedies suggested by the City, the Second Circuit held that neither a Request for Judicial Intervention ("RJI") nor a Civil Practice Law and Rules ("CPLR") Article 78 proceeding afforded plaintiffs due process (A30-32). The Circuit noted that an RJI may only be filed after the forfeiture proceeding is commenced and process is served (A30). Along with the RJI, the claimant will also request a preliminary conference, however, a determination of probable cause or the legitimacy of the continued retention of the vehicle is not examined at the preliminary conference (A30). The Circuit pointed out that, at most, the preliminary conference would merely set the date for a future probable cause hearing (A30-31). Thus, once again, the Circuit held that the Fourth and Fourteenth Amendments demanded a more expeditious determination of a property owner's rights (A31).

With respect to an Article 78 proceeding, the Second Circuit held that, "[r]equiring plaintiffs to resort to an Article 78 proceeding . . . would place the onus on each plaintiff to bring a separate civil action in order to force the City to justify its seizure and retention of a vehicle" (A31). As such, the Circuit held that an Article 78 proceeding was not a effective alternative for claimants (A32).

The Mathews v. Eldridge Analysis

The Second Circuit next evaluated the issues under the Mathews, 424 U.S. 319, three-part inquiry to determine

what process was due in this case (A33-46). The Circuit held that the first prong of the inquiry, the private interest affected, weighed in favor of claimants, because "[t]he particular importance of motor vehicles derives from their use as a mode of transportation and, for some, the means to earn a livelihood" (A33-34).

However, the Second Circuit concluded that the second inquiry, which required an analysis of the risk of erroneous deprivation, weighed in favor of the City, because, as it had acknowledged earlier, such a risk is reduced in the context of a DWI arrest because a trained police officer's assessment of an owner-driver's intoxication "can typically be expected to be accurate" (A37). Yet, the Circuit acknowledged that the City's victory in the second prong of the Mathews test was a "narrow one," because there was still a great risk of erroneous deprivation when the situation involves an innocent owner and where the City has a direct pecuniary interest in the outcome of the forfeiture proceeding (A37). Moreover, the Circuit noted that an erroneous deprivation cannot be overcome by the claimant later prevailing in the forfeiture proceeding, because the owner has already lost the ability to use the vehicle that has continued to depreciate in value as it sat in a lot (A38-39).

As to the third prong, the Government's interest, the Second Circuit held that it weighed in favor of plaintiffs (A40-44). Although the City argued that retention of the vehicle during the pendency of the forfeiture action was necessary to prevent the vehicle from being sold or destroyed before a court could render a judgment, and although the Circuit found that reason to be compelling (A40), the Circuit concluded that those goals could also be achieved by other means such as plaintiffs posting bonds or a court issuing a restraining order prohibiting the sale or destruction of the vehicle (A41).

Moreover, the City's second reason for continued retention of the vehicles during the pendency of the forfeiture proceeding, that it needs possession of the property in order to maintain in rem jurisdiction, the Second Circuit noted that this Court has held that possession of the res is unnecessary (A41-42).

As to the City's third reason, preventing the seized vehicle from being used as an instrumentality of a future crime, the Second Circuit noted that maintaining possession of the vehicle does not prevent someone from driving another vehicle while intoxicated nor does it serve its purpose when the asserted urgency is removed once the person later gains sobriety (A43). In addition, the Circuit pointed out that the City's interest was further diminished if it only removed lucrative vehicles from the road (A44).

Thus, the Second Circuit concluded that, under the Mathews balancing inquiry, the Fourteenth Amendment required that plaintiffs be afforded a prompt post-seizure, pre-judgment hearing to test the probable validity of further deprivation, including probable cause for the initial seizure, and to question whether other less restrictive alternatives would satisfy the City's interests (A44-46).

The Inapplicability of United States v. $8,850 and United States v. Von Neumann

The Second Circuit maintained that $8,850, 461 U.S. 555, and the speedy trial test of Barker v. Wingo, 407 U.S. 514 (1972), on which the City relied, were inapplicable (A46). The Circuit held that plaintiffs here were not contesting the speed with which the forfeiture proceedings were instituted or conducted, but, rather, were seeking a prompt, post-seizure hearing to challenge the City's retention of their vehicles (A46-47). Applying the speedy trial rules, the Circuit held, "presumes prior resolution of any issues involving probable cause to

commence proceedings and the government's custody of the property," thereby leaving only the delay in the proceedings as an issue (A47). The Circuit highlighted that there is a distinction in the Constitution between the need for prompt review of the City's continued retention of property and delays in rendering a final judgment (A47).

Finally, with respect to the City's and the District Court's reliance on Von Neumann, 474 U.S. 242, which held that "the forfeiture proceeding, without more, provides the postseizure hearing required by due process," the Second Circuit held, in a footnote, that this Court was merely addressing a different issue in the context of remission or mitigation in customs cases; that, in those cases, a claimant may file a motion under Fed. R. Crim. P. 41(e) for the return of his or her vehicle if he or she believed the initial seizure was improper; and that the claimant in that case was able to post a bond for the release of his vehicle (A18, n.12).

G. The City of New York's Petition for Rehearing En Banc

On September 27, 2002, the City filed its petition for rehearing en banc. The City argued that the Second Circuit's holding, that the City's forfeiture procedures were constitutionally infirm, because "the significant period" of time that "typically exists" after seizure and before the filing of the forfeiture action was questionable, conflicted with $8,850, 461 U.S. 555, and Von Neumann, 474 U.S. 242, which are dispositive in the City's favor. The City also maintained that the Circuit had already held that the City's forfeiture procedures were constitutional and had failed to give due deference to New York State court precedents, which have also previously found that the City's forfeiture statute was constitutional.

On October 28, 2002, the Second Circuit denied the City's petition for rehearing en banc (A68-69).

REASONS FOR GRANTING THE PETITION

The issue presented in this petition is vitally important to securing and maintaining uniformity of this Court's decisions and those of various other Circuits that have properly followed this Court's precedents. Moreover, the issue herein is of great significance as it will affect other cities across the country that may have similar forfeiture statutes modeled after the City's.

In holding that the City's forfeiture procedures are constitutionally infirm, the Second Circuit necessarily found that the 25-day time period for the City's commencement of a forfeiture proceeding following a claimant's demand for the return of his property was unreasonable and unconstitutional. However, that holding is in direct conflict with this Court's holdings in $8,850, 461 U.S. at 565-569, in which this Court held that an 18-month delay between the seizure of the currency in question and the commencement of forfeiture proceedings was reasonable, and with Von Neumann, 474 U.S. at 249, in which this Court interpreted its earlier ruling in $8,850 and clarified that "[i]mplicit in this Court's discussion of timeliness in *$8,850* was the view that the forfeiture proceeding, without more, provides the postseizure hearing required by due process . . . ."

The Second Circuit's holding also conflicts with several other Circuits that have rightfully followed this Court's foregoing precedents in determining whether the delay in filing a forfeiture proceeding violates due process and, thus, warrants an earlier post-seizure hearing in addition to a civil forfeiture proceeding. See, e.g., United States v. Turner, 933 F.2d 240, 245-246 (4th Cir. 1991) (employing the $8,850 and Barker analyses for a 16-month

delay in filing a forfeiture proceeding of a vehicle and finding no due process violation); Shults v. Texas, 762 F.2d 449, 453-454 (5th Cir. 1985) (using $8,850 and Barker, no due process violation involving a delay of between one year and two and one-half years between seizure of drug paraphernalia and the forfeiture proceeding); Jones v. Takaki, 38 F.3d 321, 324, reh'g en banc denied, 1994 U.S. App. LEXIS 34486 (7th Cir. 1994) (after relying on $8,850 and Von Neumann, no due process violation found for seizure of property involved in drug crimes even though no prompt post-seizure hearing held); United States v. $47,980 in Canadian Currency, 804 F.2d 1085, 1088-1089 (9th Cir. 1986), cert. denied, 481 U.S. 1072 (1987) (the Ninth Circuit Court of Appeals granting rehearing to reconsider its earlier holding in light of this Court's decision in $8,850 and finding no due process violation for a 14-month delay between seizure and the filing of a forfeiture proceeding for currency).

The fundamental requirement of due process is that the individual be given an opportunity to be heard at a meaningful time and in a meaningful manner at a hearing "appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); see also Mathews, 424 U.S. at 333. Due process does not require "that the defendant in every civil case actually have a hearing on the merits." Boddie v. Connecticut, 401 U.S. 371, 378 (1971).

It is true that there is no clearly defined outside limit as to when a post-seizure hearing, the only issue here, must occur. That was the issue this Court faced in $8,850 when it was required to determine whether the government's 18-month delay in initiating a civil forfeiture proceeding for the currency at issue was violative of the claimant's right to due process. 461 U.S. at 556. This Court analogized the situation to a defendant's speedy trial right and borrowed

the four-part balancing test from Barker, 407 U.S. at 530, used to determine whether that right was violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant. Id. at 564. This Court noted that these factors were merely guidelines to ascertain whether "the basic due process requirement of fairness has been satisfied in a particular case." Id. at 565.

In determining that the over one-year delay between seizure and the government's filing of a forfeiture proceeding was reasonable, this Court in $8,850 did not, however, also hold that a prompt, initial hearing during that 18-month period, in addition to the eventual forfeiture proceeding, as the Second Circuit ordered here, was required to satisfy due process. Indeed, this Court so clarified in Von Neumann, 474 U.S. at 249. The Circuit has, therefore, proposed a novel probable cause/"probable validity" hearing for which there is no precedent in this Court, the Second Circuit or any other Circuit.

Although required to do so by this Court in $8,850, this Court failed to employ the four-part balancing test of Barker. Indeed, the Second Circuit has recognized that, when faced with a challenge to the delay between a seizure of property and the institution of a forfeiture proceeding, it must use the Barker test "as the Supreme Court directed us to do in *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency. . . .*" Mercado v. The U.S. Customs Serv., 873 F.2d 641, 646 (2d Cir. 1989); accord United States v. $228,536, 895 F.2d 908, 917 (2d Cir.), cert. denied, 493 U.S. 958 (1990).

If the $8,850/Barker analysis had been undertaken by the Second Circuit, no due process violation would have been found.

First, there was no undue delay by the Property Clerk after seizure as all the forfeiture proceedings were commenced within the constitutional 25-day period. The procedures indicate that, although the Property Clerk is permitted to do so, there is no obligation on the part of the Property Clerk to commence a forfeiture proceeding before a claimant makes a demand for the return of the property. See 38 RCNY section 12-36(a). If the Property Clerk commences the forfeiture proceeding after the demand, the commencement must occur within 25 days of either the demand or, in the case of an arrest, the date on which the claimant provides a copy of the District Attorney's release. See 38 RCNY section 12-36(a). Therefore, the claimant would be wise to seek the return of his or her property as soon as possible to guarantee an earlier proceeding.

Although there is no evidence in the record as to when each of the plaintiffs here made their demands or provided the necessary paperwork, what is in the record, however, is the timeliness of each of the Property Clerk's forfeiture proceedings.

Second, as a corollary to the first prong, the Property Clerk is permitted time to investigate the facts to determine whether to institute forfeiture proceedings or to avoid interference with pending criminal matters. See $8,850, 461 U.S. at 565; 567.

Third, with respect to plaintiffs' assertion of their right to a prompt, post-seizure hearing, six of the seven plaintiffs did nothing to advance their causes. Several options were available to plaintiffs: (1) they could have made a quicker demand for the return of their property; (2) once the civil proceeding was commenced, they could have accelerated the action by filing an RJI, which would have provided them with an expedited hearing at which they could have sought release of their vehicles; (3) they could have obtained a private attorney or a Legal Aid attorney, as

they have done for this lawsuit; and (4) if they claimed financial hardship, plaintiffs could have sought poor person status to waive the fees to commence actions and to file RJIs.[3] Therefore, plaintiffs had, in their control, numerous opportunities to seek an earlier hearing. Plaintiffs' inaction is, as this Court held in $8,850, 461 U.S. at 569, "some indication that [plaintiffs] did not desire an early judicial hearing."

Finally, plaintiffs have not established that they have been prejudiced by the purported delay. As in $8,850, 461 U.S. at 569, plaintiffs never argued, nor can they, that they were hampered by the delay in their ability to defend against the forfeiture proceedings, because witnesses or other evidence had been lost. In August 2000, for example, Krimstock's forfeiture proceeding was tried and her car returned to her. As such, Krimstock cannot argue that she was unable to successfully defend the action.

In concluding that $8,850, 461 U.S. 555, was inapplicable, the Second Circuit narrowly claimed that plaintiffs were not contesting "the speed with which civil forfeiture proceedings themselves are instituted or conducted. Instead, plaintiffs seek a prompt post-seizure opportunity to challenge the legitimacy of the City's retention of the vehicles while those proceedings are conducted" (A46-47). However, in seeking a prompt, post-seizure hearing before the resolution of a forfeiture action, plaintiffs are necessarily challenging the length of time within which the City may constitutionally commence its

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[3] Indeed, in January 2000, Jones moved in the civil part of the New York Supreme Court for a retention hearing seeking to determine if the Property Clerk may continue to retain her vehicle.

action, thereby, placing this case clearly within the realm of $8,850.

Indeed, the plaintiffs in the aforementioned Seventh Circuit case, Jones, 38 F.3d 321, made the same claim as plaintiffs here, that they were entitled to a preliminary, post-seizure hearing to determine probable cause, but the Seventh Circuit held that Von Neumann's clarification of $8,850 disposed of their claim. Id. at 324. The Seventh Circuit held that "[t]he [Von Neumann] Court's reliance on [the $8,850/Barker factors] puts to rest the plaintiffs' suggestion in this case that *$8,850* applies only to delay in initiation of the forfeiture proceeding itself and does not extend to other types of hearing." The same situation presents itself here. Thus, the Second Circuit erred in holding that $8,850 was inapplicable and, in so holding, rendered an opinion that clearly conflicts with this Court's $8,850 holding and a Seventh Circuit ruling.

In that regard, the Second Circuit's decision is also at odds with its own precedent, because, in finding the temporal gap between seizure and the forfeiture proceedings a significant factor in the unconstitutionality of the City's forfeiture law, the Circuit also overlooked that the 25-day time limitation was already held constitutional by it, without any additional hearing requirement. See Butler v. Castro, 896 F.2d 698, 699 (2d Cir. 1990); accord Williams v. New York City Police Dept., 930 F. Supp. 49, 53 (S.D.N.Y. 1996); Leyh v. Property Clerk, 774 F. Supp. 742, 746 (E.D.N.Y. 1991).

The Second Circuit barely addressed Von Neumann, 474 U.S. 242, much less this Court's clarification there of its holding in $8,850, and, in a footnote, merely pointed out that, under the applicable customs laws, a claimant could file a motion for the return of his or her vehicle if the claimant believed the seizure of the vehicle was improper. A similar affirmative avenue of

relief is available to a claimant whose car was seized by police following a DWI arrest and who desires a speedier resolution. As noted above, a claimant, as a respondent in a forfeiture proceeding, may file an RJI and seek an expedited hearing in the forfeiture proceeding. This is a typical application available in any case.

In the past, the City's previous forfeiture law placed the onus solely on the claimant to commence a proceeding to seek the return of his or her property, and it was that burden shouldered only by the claimant which was previously found unconstitutional. Simply because the burden is now upon the City to commence the forfeiture proceeding, that does not preclude a claimant from affirmatively seeking relief. Indeed, claimants who have a vested interest in their personal property, and, indeed, contend that a vehicle is an integral part of their lives without which they cannot function, should not be permitted to cry foul when delays should arise, delays which could also be prevented by claimants taking an active role in the disposition of their cases. A claimant's hands are certainly not tied once the City timely commences a forfeiture proceeding, and a claimant's assertion of his or her rights is a very decisive factor in the Barker four-part analysis.

The Second Circuit additionally found significant that, in Von Neumann, the plaintiff had posted a bond, after which his car was released to him. However, the posting of a bond in DWI cases, which was not the situation in Von Neumann, defeats the very purpose of the seizure in the first place, which purpose was discussed heavily in Grinberg v. Safir, 181 Misc. 2d 444, 694 NYS2d 316 (Sup. Ct., NY Co.), aff'd, 266 AD2d 43, 698 NYS2d 218 (1st Dept., 1999), appeal dismissed, 94 NY2d 898, 728 NE2d 339 (2000), lv. denied, 95 NY2d 756, 734 NE2d 760 (2000). As noted in Grinberg, "[a] drunk driver's

automobile is the quintessential instrumentality of a crime--the sine qua non without which the crime could not have been committed." 181 Misc. 2d at 449, 694 NYS2d at 320. The Grinberg court, therefore, noted the City's paramount interest in deterring drunk driving, preventing the vehicle from being used for repeated illegal activity and from being used as an "instrumentality of death should the crime be repeated." Id. at 455-456; 694 NYS2d at 325-326. Permitting an individual to post a bond runs completely afoul of the analysis in Grinberg, because a bond does not prevent the car from being back on the streets capable of being driven again by a more-than-likely repeat offender. Contrary to the Circuit's conclusion, posting a bond is, therefore, not a lesser alternative to seizure in these situations.

In addition, the New York State courts have considered challenges to the City's forfeiture law and found no constitutional infirmities with those procedures. For instance, in Property Clerk v. McDermott, 185 AD2d 134, 137-138, 585 NYS2d 746, 748-749 (1st Dept., 1992), in response to a challenge to the City's forfeiture law on the basis that it was unconstitutional, the Appellate Division, First Department, held that the constitutionality of section 14-140 of the City's Administrative Code had already been established. The Appellate Division noted that "[i]ndeed, this court has repeatedly sustained forfeiture of vehicles on facts comparable to the ones involved herein." Id. at 138; 585 NYS2d at 749 (emphasis added). Moreover, the New York Supreme Court's decision in Grinberg v. Safir, 181 Misc. 2d 444, 694 NYS2d 316, was affirmed by the Appellate Division, First Department. 266 AD2d 43, 698 NYS2d 218 (1st Dept., 1999). The New York State Court of Appeals then dismissed the petitioner's appeal, because no substantial constitutional question was directly involved, 94 NY2d 898, 728 NE2d 339 (2000), and subsequently

denied leave to appeal, 95 NY2d 756, 734 NE2d 760 (2000).[4]

The City's position that the Second Circuit's opinion conflicts with this Court's precedent is in no way diminished by United States v. James Daniel Good, 510 U.S. 43 (1993), upon which the Circuit heavily relied for general propositions. James Daniel Good expounded on the need for a pre-seizure hearing for real property whereas, here, plaintiffs are seeking an additional, post-seizure hearing. In that case, four and one-half years after drugs were found at the claimant's home, the government sought to forfeit the claimant's home and land on the ground that the property had been used to facilitate a federal drug offense. Id. at 46. After an ex-parte proceeding, the government seized the claimant's property without prior notice or a hearing. Id. at 47.

This Court held that a pre-seizure hearing was required in that case, because, under the factors set forth in Mathews, (1) one's right to maintain control over his home was a "historic" private interest; (2) ex-parte seizure created a risk of error; and (3) there was no pressing government need for prompt action where the property at issue was non-abscondable, real property. James Daniel Good, 510 U.S. at 53-57. This Court noted that, in the case of real property, the government had other means to protect

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[4] In questioning whether Grinberg, represented by the New York City Liberties Foundation, had an appeal as of right, the City represented to the New York State Court of Appeals that there was no substantial constitutional question concerning the petitioner's due process challenge as such issue had been raised and disposed of in other cases. The Court of Appeals must have agreed with the City's position as it dismissed the appeal.

its interests in the property short of actually taking control of it. Id. at 59.

Although this Court noted in James Daniel Good that there are problems with post-seizure hearings occurring many months after seizure, James Daniel Good, 510 U.S. at 56, this Court was merely explaining that, in certain situations, ex-parte, pre-seizure proceedings provided little protection to persons who must then wait, as in that case, until months or years after seizure for a hearing. Id. at 55. This Court's concern simply reiterated that, under certain circumstances, as with land, a pre-seizure hearing was required.

In James Daniel Good, this Court by no means intended that, in all factual scenarios, including those such as this case where a pre-seizure hearing has been held unnecessary, a prompt, post-seizure hearing must be held in addition to the ultimate hearing at the forfeiture proceeding. Indeed, even as the Second Circuit conceded, in DWI cases such as these, there is protection from erroneous deprivation as there is some prior, probable cause review by an independent, trained police officer. Here, as in Grinberg, 181 Misc. 2d at 455, 694 NYS2d at 325, "[t]he arresting officer evaluate[d] an offense committed in his or her presence. Indicia of alcohol consumption and objective tests confirming the presence of alcohol minimize[d] the risk of erroneous deprivation." Moreover, the six plaintiffs who were arrested for DWI have not argued that the police lacked probable cause to arrest them and each eventually pled guilty to a lesser offense of driving while impaired.

Therefore, $8,850 and Von Neumann, although holding that an initial hearing is not required and that due process necessitates only a forfeiture trial, is not incompatible with the holding and reasoning of James Daniel Good. All that due process requires is a meaningful opportunity to be heard at a meaningful time and, all that is

constitutionally required of the Property Clerk, is that he or she commence a forfeiture proceeding within 25 days of a claimant's timely demand.

Therefore, for the reasons discussed above, the City respectfully requests that this Court grant its petition for a writ of certiorari.

CONCLUSION

For the reasons set forth, the City respectfully asks this Court to grant its petition for a writ of certiorari.

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January 23, 2003

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: June 20, 2001 Decided: September 18, 2002)

Docket No. 00-9488

VALERIE KRIMSTOCK, CHARLES FLATOW, ISMAEL DELAPAZ, CLARENCE WALTERS, JAMES WEBB, MICHAEL ZURLO, and SANDRA JONES, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

—v.—

RAYMOND W. KELLY, in his official capacity as Commissioner of the New York City Police Department, PROPERTY CLERK, NEW YORK CITY POLICE DEPARTMENT, and THE CITY OF NEW YORK,

Defendants-Appellees.

Before:

JACOBS, F.I. PARKER, and SOTOMAYOR,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Michael B. Mukasey, *Chief Judge*) granting defendants' motion to dismiss the complaint, which alleges constitutional violations arising from the seizure of motor vehicles by the police. We vacate, holding that plaintiffs' due process rights were violated by the post-seizure, pre-judgment retention of vehicles absent a prompt opportunity to challenge the probable validity of and justification for that deprivation *pendente lite*.

Vacated and remanded.

THOMAS M. O'BRIEN, of counsel, The Legal Aid Society, Criminal Defense Division, New York, New York, *for plaintiffs-appellants*.

JULIE STEINER, Assistant Corporation Counsel, New York, New York, for Michael D. Hess, Corporation Counsel of the City of New York (Stephen J. McGrath, *on the brief*), *for defendants-appellees*.

SOTOMAYOR, *Circuit Judge*:

Defendant City of New York seizes the motor vehicles of some of those accused of driving while intoxicated and of committing other crimes for which a motor vehicle could be considered an instrumentality.[1] The City maintains possession

[1] The New York City Corporation Counsel has delegated to the Property Clerk of the New York City Police Department the authority, under New York City's Administrative Code, to bring the civil forfeiture actions at issue in this appeal. *See Property Clerk v. Covell*, 139 Misc. 2d 707,

of these vehicles in the hope of one day gaining title to them by prevailing in civil forfeiture proceedings. These proceedings generally await the resolution of criminal charges and can take months or even years to be finalized. The City claims and plaintiffs-appellants ("plaintiffs") do not contest that the proceedings are authorized, as is the seizure, by provisions of the City's Civil Administrative Code that cede to the City title to property found to be an instrumentality of crime.

Plaintiffs contend that their inability to challenge, promptly after the vehicles are seized, the legitimacy of and justification for the City's retention of the vehicles prior to judgment in any civil forfeiture proceeding violates their constitutional rights. We agree. A car or truck is often central to a person's livelihood or daily activities. An individual must be permitted to challenge the City's continued possession of his or her vehicle during the pendency of legal proceedings where such possession may ultimately prove improper and where less drastic measures than deprivation *pendente lite* are available and appropriate.

We vacate the judgment of the district court and remand for the court to order, after consultation with the parties, the appropriate injunctive relief.

BACKGROUND

Plaintiffs challenge the seizure and retention of motor vehicles under a section of the City's Civil Administrative Code, N.Y.C. Code § 14-140. The City claims and plaintiffs do not contest that the statute authorizes the City's Property

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708-09, 528 N.Y.S.2d 299, 300 (Sup. Ct. N.Y. Co. 1988). We refer to defendants Commissioner of the New York City Police Department, the Property Clerk of the New York City Police Department, and the City of New York, collectively, as the "City."

Clerk to take custody, following seizure, of, among other things, "all property . . . suspected of having been used as a means of committing crime or employed in aid or furtherance of crime . . . ." N.Y.C. Code § 14-140(b). Seized property is retained by the Property Clerk of the New York City Police Department until the City either loses a future forfeiture suit or decides not to pursue one and someone claims the seized property. *Id.* § 14-140(e); 38-A New York City Rules & Regulations ("R.C.N.Y.") § 12-36. The relevant provision of the Administrative Code states:

> Where . . . property . . . ha[s] been used as a means of committing crime or employed in aid or in furtherance of crime . . . , a person who so . . . used [or] employed . . . any such . . . property or permitted or suffered the same to be used [or] employed . . . or who was a participant or accomplice in any such act, or a person who derives his or her claim in any manner from or through any such person, shall not be deemed to be the lawful claimant entitled to . . . such . . . property . . . .

N.Y.C. Code § 14-140(e)(1). The statute applies to all levels of crime, not just felonies, and to all types of crimes. Moreover, it applies to all property, both real and personal.

Under the statute, the City can seize a motor vehicle following an arrest for the state-law charge of driving while intoxicated ("DWI") or any other crime for which the vehicle could serve as an instrumentality. The arraignment of the defendant in the criminal action concerns only the prosecution of the criminal charge. A defendant charged with DWI does not have a right to a post-arrest hearing to determine whether probable cause existed either for his or her arrest or for the seizure of the vehicle. Unlike a felony charge, for which a "prompt" probable cause hearing must be held or evidence of probable cause must be presented to a grand jury,

N.Y. Crim. Proc. § 180.10, a misdemeanor charge of DWI requires no post-arrest determination of probable cause, *id.* §§ 170.10 *et seq.*; *People v. Green*, 96 N.Y.2d 195, 199-200, 726 N.Y.S.2d 357, 361 (2001) (noting, in a DWI case, that whereas the "New York Constitution requires a Grand Jury indictment for felony offenses . . . , misdemeanor charges may be brought on a prosecutor's information"); *In re Robert L.*,129 Misc. 2d 742, 744, 493 N.Y.S.2d 970, 972 (Fam. Ct. Bronx Co. 1985) ("There is no provision for a preliminary or probable cause hearing under the [New York] Criminal Procedure Law in misdemeanor cases."). Moreover, N.Y.C. Code § 14-140 affords the vehicle owner no opportunity for a prompt post-seizure hearing to test probable cause for the vehicle's seizure. Thus, neither New York criminal procedure nor the City's civil forfeiture law allows a DWI defendant or the owner of a vehicle driven by a DWI defendant to challenge promptly the legitimacy of the City's continued custody of the vehicle.[2] That challenge may not be made until the City seeks the vehicle's forfeiture in a separate civil proceeding that could take place months or even years after the seizure.

Upon seizing the vehicle, the police issue the arrestee a voucher for the vehicle and any other seized property. 38-A R.C.N.Y. § 12-32(a). If a claimant makes a formal demand for the return of the vehicle, the City has twenty-five days in which either to initiate a civil forfeiture proceeding under the City's Administrative Code or to release the vehicle. *Id.* § 12-36(a).[3] Even if the City chooses to commence a civil forfei-

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[2] As noted below, the remedies available to those who have had their property seized under New York state civil forfeiture law (N.Y. C.P.L.R. art. 13-A) do not apply to seizures under N.Y.C. Code § 14-140. Other remedies suggested by the City, specifically a Request for Judicial Intervention and an Article 78 proceeding brought under New York state law, do not provide a prompt retention hearing, as discussed below.

[3] The applicable rules state that "[i]f a timely demand is made for the return of the property before the forfeiture proceeding is instituted, such

ture proceeding within the twenty-five day period, however, the proceeding is commonly stayed until the criminal proceeding concludes. In a forfeiture proceeding, the City "bear[s] the burden of proving by a preponderance of the evidence that [it] is legally justified to continue to retain the property." *Id.* § 12-36(b).[4]

Vehicles belonging to the named members of the putative class in this action were seized by the City between March and May of 1999. The vehicles of six of the seven named plaintiffs—Valerie Krimstock, Charles Flatow, Ismael Delapaz, Clarence Walters, James Webb, and Michael Zurlo—were seized after each was arrested for DWI.[5] In some cases,

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proceeding shall be brought no later than . . . within 25 days after the date of demand. If such proceeding is not commenced within this time period, the property clerk shall give written notice to the claimant or the claimant's representative, at his or her last known address . . . that the property will be returned forthwith to that person." 38-A R.C.N.Y. § 12-36(a). Absent a demand for the return of the property, the City may commence forfeiture proceedings on its own initiative, often at the conclusion of the criminal proceedings. *See id.* ("If such proceeding is instituted before the termination of criminal proceedings against the claimant, this subchapter shall not be construed to effect [*sic*] any right of a party to the forfeiture proceeding to have the forfeiture proceeding stayed for such period as the court may determine.").

[4] This provision and several others found in the rules governing forfeitures under the present statute were adopted as a result of this Court's determination that certain aspects of the predecessor statute were unconstitutional. *See McClendon v. Rosetti*, 460 F.2d 111, 114-16 (2d Cir. 1972) (striking down procedures for reclaiming property after termination of criminal proceedings charging crimes unrelated to seized property). As the district court below indicated, the challenge in the instant case presents claims not considered in our previous review of the statute. *Krimstock v. Safir*, No. 99 Civ. 12041, 2000 WL 1702035, at *4 (S.D.N.Y. Nov. 13, 2000).

[5] The state statute prohibits the operation of a motor vehicle if the driver "has .10 of one per centum or more by weight of alcohol in the person's blood." N.Y. Veh. & Traf. § 1192(2). A violation is a misdemeanor punishable by a fine or by imprisonment for not more than one year, or both. *Id.* § 1193(1)(b).

the Property Clerk did not institute civil forfeiture actions against plaintiffs' vehicles until well over two months after the seizures. For example, Clarence Walters' car was seized on March 15, 1999. He had never been arrested for any offense before, and his DWI case in criminal court ended on June 1, 1999, when he pleaded guilty to the lesser charge of driving while impaired, a non-criminal violation. N.Y. Veh. & Traf. § 1192(1). Mr. Walters paid a fine, performed community service, and completed a Drinking Driver program that rendered him eligible for restoration of his driver's license. On June 4, more than two-and-a-half months after the seizure of his vehicle, he was served with a forfeiture complaint. At no time between June 1999 and May 2001, when his vehicle was finally released, was Mr. Walters given an opportunity to challenge the City's retention of the vehicle.

Each of the five other DWI arrestees also pleaded guilty to the lesser charge of driving while impaired. Valerie Krimstock, who at the age of forty-eight had never been arrested before, entered her plea to the lesser charge in September 1999—some four months after she had been served with a forfeiture complaint. It was not until eleven months later, in August 2000, that a judge dismissed the forfeiture action and ordered that her 1995 Toyota, on which she had continued to make monthly payments of $273.00, be returned to her.

In the case of Charles Flatow—a retired sales manager whose car was seized on April 3, 1999 in connection with a first-time DWI arrest—the Property Clerk commenced a forfeiture action on June 15, 1999. Mr. Flatow also pleaded guilty to the lesser charge, paid a fine, and completed the required community service and Drinking Driver program. Yet by December 1999, he still had received no hearing in the forfeiture action and his car remained in police custody. As a result, Mr. Flatow had not been given an opportunity to present evidence that a prescription anti-depressant medication he was taking at the

time of the arrest caused the Breathalyzer test to exaggerate the percentage of alcohol in his bloodstream.

To take yet another example, the 1995 Plymouth van owned by the seventh named plaintiff, Sandra Jones, was seized in March 1999 when her estranged husband, to whom she had lent the vehicle, was arrested for drug and weapon possession. Even though these charges were later dismissed, the Property Clerk initiated a forfeiture action in May 1999, alleging that Ms. Jones had "consented, suffered or permitted" her vehicle to be used by her husband in the commission of crimes. During the pendency of the action, Ms. Jones continued to make monthly payments of $428.06 on her impounded vehicle. In January 2000, some ten months after the police had seized it, the Property Clerk returned her van. In sum, at the time this suit was filed in December 1999, no court had yet ruled on the legitimacy of the retention of any of plaintiffs' vehicles, all of which remained in the possession of the police even though the criminal cases underlying the forfeiture actions had concluded and none had resulted in a conviction of a crime that would serve as a predicate for forfeiture.[6]

Plaintiffs brought this action under 42 U.S.C. § 1983, alleging violations of the Due Process Clause of the Four-

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[6] Judge Jacobs does not subscribe to the four preceding paragraphs which recount and rely upon the circumstances particular to the named plaintiffs in this putative class action. His reasons are as follows: (1) The opinion implicitly generalizes from circumstances of the individual plaintiffs—for example, that this one had never been arrested before, that this one is a retired person, and so forth. The named plaintiffs in a putative class action are frequently selected to be especially sympathetic and appealing, but the rule we make will also govern vehicles seized from persons who are habitual drunks. (2) The fact that the six "DWI arrestees . . . pleaded guilty to the lesser charge of driving while impaired" does not remotely call into question the arresting officer's probable cause to arrest them for drunk driving. It goes without saying that plea bargains in misdemeanor cases are offered for many reasons other than factual innocence or even insufficiency of evidence.

teenth Amendment and seeking a prompt hearing following the seizure of vehicles, at which the City "must demonstrate probable cause that the car was used in furtherance of a crime and that it is necessary that the vehicle remain in the City's custody until the conclusion of the forfeiture proceeding."[7] Named plaintiffs moved for class certification pursuant to Fed. R. Civ. P. 23(a) and (b)(2) and for a preliminary injunction under Fed. R. Civ. P. 65. The City cross-moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6).

The district court granted the City's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Krimstock*, 2000 WL 1702035, at *7. The court rejected the City's request to dismiss plaintiffs' constitutional claims on abstention grounds, finding that the civil forfeiture proceedings under the New York City Administrative Code did not provide an adequate forum for raising these claims. *Id.* at *3.[8] Applying the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine what procedural safeguards are required to satisfy the Due Process Clause of the Fourteenth Amendment in the circumstances of this case, the district court held that plaintiffs were not entitled to prompt post-seizure hearings on the question of probable cause or the legitimacy of retention *pendente lite*. *Id.* at *6-*7. Specifically, the court held that "plaintiffs' due process right to a meaningful hearing at a meaningful time does not require the additional safe-

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[7] Even though plaintiffs invoked Fourteenth Amendment protections in their complaint, their claims involve both the City's probable cause to believe their vehicles were subject to seizure and forfeiture (a Fourth Amendment concern, as applied through the Fourteenth Amendment) and the City's justification for retaining their vehicles *pendente lite* (a Fourteenth Amendment concern). We address both issues.

[8] The court did abstain from hearing plaintiffs' claim that they had a due process right to a meaningful opportunity to request court-appointed counsel. *Krimstock*, 2000 WL 1702035, at *3. Plaintiffs have not raised this issue on appeal, and we therefore deem it abandoned.

guard of a probable cause hearing." *Id.* at *7. The court concluded that the plaintiffs' interests were adequately protected by "a probable cause arrest" and the eventual forfeiture proceeding. *Id.* at *6-*7. This appeal followed.

DISCUSSION

A federal court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "We review *de novo* a district court's dismissal of a complaint pursuant to Rule 12(b)(6), accepting all factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor." *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 161 (2d Cir. 2000). Under Rule 12(b)(6), we uphold a district court's dismissal only if "it appears beyond doubt that the plaintiffs can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief." *Id.* (internal citation omitted).

Our primary focus today is the City's continued retention of vehicles after their warrantless seizure by the police and prior to the ultimate resolution of the forfeiture action in court. It is this intermediate deprivation, lasting months or sometimes years without any prompt hearing before a neutral fact-finder, that we deem constitutionally infirm. In the absence of a showing that continued impoundment constitutes a valid deprivation, seized vehicles must be released during the pendency of civil proceedings.

We reach this conclusion in light of the dictates of the Fourth and Fourteenth Amendments. In Part I, we establish a framework for analyzing plaintiffs' challenge to the probable validity of the City's post-seizure, pre-judgment retention of their vehicles, and we define "probable validity" as a due process concept that in the present case embraces the City's probable cause for initially seizing the vehicles. In

Parts II and III, we discuss the applicability of the Fourth and Fourteenth Amendments to seizure and retention of personal property under civil forfeiture laws. In the course of discussing the Fourteenth Amendment, we give special attention to three areas of due process concern raised by N.Y.C. Code § 14-140 as applied to the present facts: the temporal gap that typically exists between vehicle seizure and the eventual forfeiture proceeding; the plight of innocent owners;[9] and the inadequacy of the remedies suggested by the City for addressing the propriety of continued retention of vehicles seized under § 14-140. In Part IV, we employ the three-factor inquiry prescribed by the Supreme Court in *Mathews v. Eldridge* to determine what procedural safeguards are required to satisfy the Due Process Clause in this case. Finding that plaintiffs' right to due process has been violated, we conclude in Part V by offering general guidance as to the prompt post-seizure retention hearing that we deem to be constitutionally required.

I. *The Probable Validity of Continued Deprivation of Vehicles*

Plaintiffs in this action essentially seek an early opportunity to test the City's likelihood of success on the merits of the forfeiture action, or what the Supreme Court has termed the "probable validity" of continued deprivation of a claimant's property during the pendency of legal proceedings. *Cf. Comm'r v. Shapiro*, 424 U.S. 614, 629 (1976) ("[A]t least where irreparable injury may result from a deprivation

[9] Here and throughout this opinion, we use the phrase "innocent owner" as a term of art denoting a person who has an ownership interest in property threatened with civil forfeiture but who neither participated in nor permitted or suffered the alleged illegal use of the property, and persons who claim that status. Our use of the term is not intended to suggest that drivers or other persons initially charged with a vehicle-related crime are not presumed innocent until proven guilty in a criminal proceeding or are presumptively unlikely to prevail in a civil forfeiture proceeding.

of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation must be made."); *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972) ("Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property, . . . it is axiomatic that the hearing must provide a real test. '(D)ue process is afforded only by the kinds of "notice" and "hearing" that are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property.' ") (quoting *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 343 (1969) (Harlan, J., concurring)).

For present purposes, we treat probable validity as a comprehensive due process concept that includes the City's probable cause for initially seizing vehicles. Clearly, the legality of a warrantless seizure is a component of the larger question of the probable validity of continued retention of a seized vehicle. If a seizure lacked probable cause, and the City could offer no untainted post-seizure evidence to justify further retention, the claimant's vehicle would ordinarily have to be released during the pendency of proceedings. *Cf. Marine Midland Bank, N.A. v. United States*, 11 F.3d 1119, 1125 (2d Cir. 1993) ("[C]ourts in this circuit have ordered the return of seized property before the commencement of a [federal] forfeiture trial on the ground that the government lacked probable cause to seize the property at the time of the seizure.").

Although there is an obvious overlap between probable cause for a seizure and the probable validity of a retention, the two are not necessarily coextensive. For example, at a retention hearing, the City might succeed in showing that

police officers had probable cause for seizing the vehicle of a DWI arrestee, yet be unable to establish the probable validity of continued deprivation *pendente lite* in the face of proof of innocent ownership or evidence that the Breathalyzer test had registered inaccurate results. Similarly, the City might establish probable cause for a seizure but fail to persuade the court that its interest in the accused instrumentality would not be protected by measures less drastic than continued deprivation. Conversely, the City might fail to establish probable cause for an initial seizure yet be able to offer post-seizure evidence showing the probable validity of retention during the pendency of proceedings. Thus, the legality of a seizure typically will be a subset of the larger due process question of the legitimacy of continued impoundment *pendente lite*.

II. *The Role of the Fourth Amendment in Civil Forfeiture*

The Supreme Court has held that the Fourth Amendment protects claimants against unreasonable seizures of their property in the civil forfeiture context. *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993) ("The Fourth Amendment does place restrictions on seizures conducted for purposes of civil forfeiture . . . ."); *see also One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 696, 700 (1965) (holding that the exclusionary rule under the Fourth Amendment applies to civil forfeiture proceedings); *cf. In re Seizure of All Funds in Accounts in Names Registry Publ'g, Inc.*, 68 F.3d 577, 580 (2d Cir. 1995) ("In order to seize property under [federal civil forfeiture law], the government must demonstrate that there was probable cause to believe that the property is subject to forfeiture."); *United States v. Daccarett*, 6 F.3d 37, 49 (2d Cir. 1993) ("[T]his circuit requires seizures made pursuant to [federal civil forfeiture law] to comport with the fourth amendment."); *United*

States v. $37,780 in U.S. Currency, 920 F.2d 159, 162 (2d Cir. 1990) (same).

The Supreme Court has not said that a probable cause hearing is required after a warrantless seizure of property and before trial of a government's claim to title under a civil forfeiture law. Yet many of our laws are fashioned to ensure that a prompt hearing before a neutral judicial or administrative officer is held after the warrantless seizure of property and before full adjudication of the merits of a claim. One example is the federal civil forfeiture regime as administered by the courts of this Circuit in the context of seizures of illicit proceeds and instrumentalities. As this Court has recognized, "the seizure and forfeiture of property are two distinct events under the [federal] civil forfeiture laws." *Marine Midland Bank*, 11 F.3d at 1124 (citing *Daccarett*, 6 F.3d 37 at 46).[10] "While both events require the government to have probable cause, the government is not required to demonstrate probable cause until the forfeiture trial *unless a claimant challenges the validity of the seizure before trial*." *Id.* (emphasis added). If the government, once challenged, cannot establish probable cause for the initial seizure or offer post-seizure evidence to justify continued impoundment, retention of the seized property runs afoul of the Fourth Amendment. *Id.* at 1125; *see also United States v. U.S. Currency in Amount of One Hundred Forty-Six Thousand, Eight Hundred Dollars*, No. 96-CV-4882, 1997 WL 269583, at *3 (E.D.N.Y. Apr. 28,

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[10] *Marine Midland Bank* involved the seizure of interbank funds under the federal civil forfeiture laws and upon a warrant issued by a federal magistrate judge, who had determined that the government had probable cause to believe that interbank accounts were being used to launder narcotics proceeds. *Marine Midland Bank*, 11 F.3d at 1121. The banks moved for return of the seized funds by order to show cause pursuant to Fed. R. Crim. P. 41(e). Holding that "[t]he magistrate judge's probable cause determination should be subject to judicial review," this Court found that the warrant had not been supported by probable cause and therefore ordered the release of certain of the interbank funds. *Id.* at 1125.

1997) ("[I]f the claimant [in a federal civil forfeiture action] properly raises the issue of the government's probable cause for seizure before the forfeiture trial, and if the claimant demonstrates that the government lacked probable cause at the time of seizure, the property may be returned to the claimant until the forfeiture trial is held.").

We recognize that the likelihood of illegal seizure is reduced in the context of DWI arrests and that the City's burden of proving probable cause in such cases is not onerous.[11] We cannot agree with the district court, however, that a warrantless arrest is sufficient by itself to ensure the legality of the initial seizure. Some risk of erroneous seizure exists in all cases, and in the absence of prompt review by a neutral fact-finder, we are left with grave Fourth Amendment concerns as to the adequacy of an inquiry into probable cause that must wait months or sometimes years before a civil forfeiture proceeding takes place. Our concerns are heightened by the fact that the seizing authority in this case "has a direct pecuniary interest in the outcome of the proceeding." *James Daniel Good Real Prop.*, 510 U.S. at 55-56; *see also Property Clerk v. Hyne*, 147 Misc. 2d 774, 780, 557 N.Y.S.2d 244, 248 (Sup. Ct. N.Y. Co. 1990) (noting that § 14-140's "remedial pur-

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[11] *See People v. Earley*, 244 A.D.2d 769, 770-71, 666 N.Y.S.2d 223, 224 (3d Dep't 1997) (holding that arresting officer's testimony at suppression hearing supported finding of probable cause to arrest defendant for DWI, despite contradictory testimony of defendant and his passenger and despite minor inconsistencies in officer's testimony); *Grinberg v. Safir*, 181 Misc. 2d 444, 455, 694 N.Y.S.2d 316, 325 (Sup. Ct. N.Y. Co.) ("The seizure is simultaneous with a DWI arrest for which the police must have probable cause. The arresting officer evaluates an offense committed in his or her presence. Indicia of alcohol consumption and objective tests confirming the presence of alcohol minimize the risk of erroneous deprivation."), *aff'd*, 266 A.D.2d 43, 698 N.Y.S.2d 218 (1st Dep't 1999); *see also People v. Mathison*, 287 A.D.2d 384, 384, 732 N.Y.S.2d 2, 2-3 (1st Dep't 2001) (noting that probable cause may be demonstrated by reliable hearsay, including information provided by fellow officer present at the arrest scene).

poses" include the fact that "revenue is generated and applied toward the cost of law enforcement"), *aff'd*, 171 A.D.2d 506, 567 N.Y.S.2d 603 (1st Dep't 1991).

III. *The Role of the Fourteenth Amendment in Civil Forfeiture*

The government's seizure and retention of property under civil forfeiture statutes, in the absence of a meaningful hearing at a meaningful time, raise serious due process concerns under the Fourteenth Amendment. *See James Daniel Good Real Prop.*, 510 U.S. at 62 (holding that, absent exigent circumstances, "the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture"); *Fuentes*, 407 U.S. at 80 (holding, in a case involving state prejudgment replevin statutes that permitted seizure of chattels without a prior opportunity to be heard, that it is "fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner") (quotation marks omitted).

The fundamental right to notice and a meaningful hearing at a meaningful time has been recognized in many different contexts. *See, e.g., James Daniel Good Real Prop.*, 510 U.S. at 43 (seizure of real property under federal forfeiture law); *Connecticut v. Doehr*, 501 U.S. 1 (1991) (state *ex parte* attachment procedures); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (termination of municipal utility service); *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (prejudgment garnishment of bank account); *Fuentes*, 407 U.S. at 67 (state prejudgment replevin statutes); *Sniadach*, 395 U.S. at 337 (state wage-garnishment procedure). Due process is inevitably a fact-intensive inquiry. *Doehr*, 501 U.S. at 10 ("[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unre-

lated to time, place and circumstances.") (quotation marks omitted). The "timing and nature of the required hearing will depend on appropriate accommodation of the competing interests involved." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (quotation marks omitted).

A. *Temporary Deprivations of Property* Pendente Lite

Temporary deprivation of real or personal property *pendente lite* in a forfeiture action must satisfy the demands of the Fourteenth Amendment. The Supreme Court has held that even a brief and provisional deprivation of property pending judgment is of constitutional importance. *See Fuentes*, 407 U.S. at 84-85 ("[I]t is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment."); *see also United States v. Monsanto*, 924 F.2d 1186, 1192 (2d Cir. 1991) (noting that a "temporary and nonfinal" removal of a defendant's assets, pursuant to a federal criminal forfeiture statute and pending resolution of the criminal case, "is, nonetheless, a deprivation of property subject to the constraints of due process") (quotation marks omitted). Plaintiffs here have not challenged the procedural safeguards under New York law that guarantee the accuracy of any final judgment of forfeiture. Instead, they question the legitimacy of and justification for the intermediate deprivation of their property occasioned after seizure of the vehicle and before judgment in civil forfeiture proceedings under N.Y.C. Code § 14-140, and, indeed, before those proceedings are even commenced. *See James Daniel Good Real Prop.*, 510 U.S. at 56 ("The question in the civil forfeiture context is whether *ex parte* seizure is justified by a pressing need for prompt action."); *Fuentes*, 407 U.S. at 80-81 (stating that due process is intended "to minimize substantively unfair or mistaken deprivations of property").

The district court in this case collapsed the separate issues of probable cause and due process into a single analysis and, applying the test for due process set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), concluded that plaintiffs had alleged no facts to suggest that a "probable cause arrest" is a "procedure" that is "unusually unreliable," *Krimstock*, 2000 WL 1702035, at *6, and further concluded that "plaintiffs' due process right to a meaningful hearing at a meaningful time does not require the additional safeguard of a probable cause hearing," *id.* at *7. In reaching this determination, the court applied the "speedy trial" test as deployed in the federal customs case of *United States v. $8,850*, 461 U.S. 555 (1983), and held that plaintiffs' due process interests are fully protected by the eventual forfeiture proceeding. *Id.*[12]

The district court's analysis resembles the approach taken by the New York Supreme Court in *Grinberg v. Safir*, in which a DWI arrestee brought an Article 78 proceeding to contest the City's seizure of his 1988 Acura for forfeiture. In response to Grinberg's Fourth Amendment challenge to the seizure and retention of his vehicle, the court, citing various warrantless arrest and seizure exceptions, held that "[o]nce an object is permissibly seized as an instrumentality during an arrest, no warrant, pretrial hearing or judicial approval is

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[12] The district court also cited *United States v. Von Neumann*, 474 U.S. 242, 249 (1986), in declaring that " 'the forfeiture proceeding, without more, provides the postseizure hearing required by due process.' " *Krimstock*, 2000 WL 1702035, at *5. The Supreme Court in *Von Neumann*, however, was addressing the different issue of what process was due in proceedings for remission or mitigation under U.S. customs laws when a claimant could challenge the seizure of his or her property in judicial forfeiture proceedings. *Von Neumann*, 474 U.S. at 249-50. We note that under the customs laws applicable in *Von Neumann*, the claimant could file a motion under Fed. R. Crim. P. 41(e) for return of the seized vehicle if he or she "believe[d] the initial seizure was improper," *id.* at 244 n.3, and that, in the case of Von Neumann, Customs released the claimant's vehicle after he had posted a bond pursuant to 19 U.S.C. § 1614, *id.* at 246.

needed for retention during the criminal action." *Grinberg*, 181 Misc. 2d at 452, 694 N.Y.S.2d at 323. The court also found that Grinberg's Fourteenth Amendment right to a meaningful hearing at a meaningful time had not been violated. Citing the speedy trial test as applied in *$8,850*, the court reasoned that "[i]f pendency of a criminal action is a legitimate reason for the delayed filing of a forfeiture proceeding, then retention of the subject vehicle without a hearing, while the criminal action is pending, is also permissible." *Grinberg*, 181 Misc. 2d at 456, 694 N.Y.S.2d at 326.

For reasons discussed more fully below, we disagree with these courts' conclusions. Contrary to the district court's determination in the present case, a warrantless arrest by itself does not constitute an adequate, neutral "procedure" for testing the City's justification for continued and often lengthy detention of a vehicle which may be owned by the arrestee or by someone entirely unconnected with the conduct that gave rise to the arrest. Further, to say that the forfeiture proceeding, which often occurs more than a year after a vehicle's seizure, represents a meaningful opportunity to be heard at a meaningful time on the issue of continued impoundment is to stretch the sense of that venerable phrase to the breaking point. We also consider it a non sequitur to hold, as the *Grinberg* court did, that because postponing the commencement of a forfeiture action pending the underlying criminal proceeding may not offend due process, retention of the seized vehicle without a hearing throughout that same period, or longer, is constitutionally permissible. The issues of a speedy trial and a prompt retention hearing are not parallel in this context, particularly when less restrictive methods for protecting the City's interest in the allegedly offending *res* are available. *Cf. Lee v. Thornton*, 538 F.2d 27, 32 (2d Cir. 1976) ("Deprivation of means of transportation for [substantial] periods requires an opportunity to be heard.");

DeBellis v. Property Clerk, 79 N.Y.2d 49, 57, 580 N.Y.S.2d 157, 161 (1992) ("The core principle of the Second Circuit's *McClendon* decision is that, although the government may seize and hold a citizen's property for a variety of reasons in connection with a criminal or related proceeding, once those proceedings have terminated or it is determined that the property is not related to or is otherwise not needed for those proceedings, due process requires that the property be returned upon demand unless the government can establish a new basis for its detention.").

In sum, just as in the attachment and seizure cases cited above, the purpose of requiring due process in the present circumstances "is not only to ensure abstract fair play to the individual," but "more particularly, . . . to protect his [or her] use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property." *James Daniel Good Real Prop.*, 510 U.S. at 53 (quotation marks and citation omitted). We conclude that plaintiffs have a right under the Fourteenth Amendment to ask what "justification" the City has for retention of their vehicles during the pendency of proceedings, *cf. id.* at 56, 61, and to put that question to the City at an early point after seizure in order to minimize any arbitrary or mistaken encroachment upon plaintiffs' use and possession of their property.

B. *Special Due Process Concerns in the Present Case*

Our concern that plaintiffs be provided an early opportunity to test the propriety of the City's retention of their vehicles, after seizure pursuant to N.Y.C. Code § 14-140 and prior to any eventual civil forfeiture judgment, is heightened by several factors. These factors include the temporal gap that typically exists between seizure of the vehicle and the forfeiture proceeding, the inability of innocent owners to chal-

lenge promptly the City's retention of their vehicles *pendente lite*, and the inadequacy of other suggested remedies for providing prompt post-seizure review under New York's administrative and civil codes.

1. *The Temporal Gap Between Seizure and Forfeiture Proceedings*

N.Y.C. Code § 14-140 and the applicable rules leave a significant temporal gap between the moment a vehicle is seized and the time the City commences forfeiture proceedings. Although it is possible for the City to initiate a forfeiture action earlier, it need not bring such an action until twenty-five days after a claim is made for the vehicle. 38-A R.C.N.Y. § 12-36(a) ("If a timely demand is made for the return of the property before the forfeiture proceeding is instituted, such proceeding shall be brought no later than . . . within 25 days after the date of demand.").[13] If no demand is made, the Property Clerk may initiate the action at its discretion. In the present case, forfeiture proceedings were commenced, at the earliest, three weeks after seizure of a vehicle, and, at the latest, well over two months after seizure. Thus, there typically exists a significant period after seizure and before the filing of the forfeiture action when the City is not held responsible for the legality of the warrantless seizure or the continued retention of the vehicle. The period between the seizure and the holding of a hearing in the forfeiture action is, of course, considerably longer.[14] It can take months or even years.

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[13] The 25-day rule under 38-A R.C.N.Y. § 12-36(a) represents a legislative expansion of the time period originally ordered in *McClendon v. Rosetti*, 369 F. Supp. 1391, 1394 (S.D.N.Y. 1974), which required the Property Clerk to initiate a forfeiture proceeding within 10 days after a claimant's timely demand.

[14] In contrast, while the statute here requires only that a forfeiture proceeding be *initiated* within 25 days after a claim is made, the California controlled substances act requires that, once a person claiming an inter-

Many state forfeiture statutes, unlike N.Y.C. Code § 14-140, provide an early opportunity to challenge the governmental authority's probable cause for seizing property or the legitimacy of its retaining seized property during the pendency of proceedings. Florida's contraband forfeiture statute is one example. In upholding the Florida statute in a case involving police seizure of a vehicle from a public place, the U.S. Supreme Court observed that, although the police had not needed to obtain a warrant to seize the vehicle, the statute required that " 'the person entitled to notice is notified at the time of the seizure . . . that there is a right to an adversarial preliminary hearing after the seizure to determine whether probable cause exists to believe that such property has been

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est in seized property files a verified claim, "the [civil] forfeiture proceeding shall be set for *hearing on a day not less than 30 days therefrom*, and the proceeding shall have priority over other civil cases." Cal. Health & Safety Code § 11488.5(c)(1) (emphasis added). Similarly, the civil forfeiture provision of the Wisconsin controlled substances act states that "the action shall be set for hearing within 60 days of the service of the answer but may be continued for cause or upon stipulation of the parties." Wis. Stat. § 961.555(2)(b); *see also State v. Rosen*, 240 N.W.2d 168, 171-72 (Wis. 1976) (holding that the 60-day rule under the Wisconsin controlled substances act is mandatory and that failure to set the hearing within that period deprived the trial court of jurisdiction). In South Carolina, when a motorist is convicted of a third or subsequent DUI violation within 10 years, the vehicle may be seized and forfeited, but the vehicle's registered owner, who must be given notice within 72 hours of the confiscation, has 10 days to request a judicial hearing to determine issues concerning the owner's knowledge and authorization. "The hearing must be held within ten days from the date of receipt of the request." S.C. Code Ann. § 56-5-6240(A).

Some legislatures have sought to mitigate the depreciation of property values and other costs incurred through delays of civil forfeiture proceedings. *See, e.g.*, Ariz. Rev. Stat. § 13-4310(I) ("Before staying civil discovery [in a forfeiture proceeding until a related criminal trial is concluded], the court shall make adequate provision to prevent any loss or expense to any victim or party resulting from the delay, including loss or expense due to maintenance, management, insurance, storage or preservation of the availability of the property or due to depreciation in the value of the property.").

or is being used in violation of the Florida Contraband Forfeiture Act.' " *Florida v. White*, 526 U.S. 559, 562 n.2 (1999) (quoting Fla. Stat. § 932.703(2)(a)). The Florida statute further provides:

> Seizing agencies shall make a diligent effort to notify the person entitled to notice of the seizure. Notice provided by certified mail must be mailed within 5 working days after the seizure and must state that a person entitled to notice may request an adversarial preliminary hearing within 15 days after receiving such notice. . . . The seizing agency shall set and notice the hearing, which must be held within 10 days after the request is received or as soon as practicable thereafter.

Fla. Stat. § 932.703(2)(a); *see also Cochran v. Harris*, 654 So. 2d 969, 972 (Fla. Dist. Ct. App. 1995) (holding that a delay of twenty-three days beyond the ten-day limit for a hearing under § 932.703 violated the claimants' right to due process); *cf.* Ariz. Rev. Stat. § 13-4310(B) (providing that, upon timely application by an owner of or interest holder in property threatened with forfeiture, the court "may issue an order to show cause to the seizing agency for a hearing on the sole issue of whether probable cause for forfeiture of the property then exists"); Cal. Health & Safety Code § 11488.4(h) (providing that "[i]f there is an underlying or related criminal action, a defendant may move for the return of the property [threatened with civil forfeiture] on the grounds that there is not probable cause to believe that the property is forfeitable . . . ."). Nothing like the procedural safeguards contained in the Florida contraband forfeiture act and similar state statutes is built into the New York forfeiture law.

In addition, many state statutes afford avenues of interim relief for claimants who are adversely affected by seizure and retention of property. For example, the Florida contraband

forfeiture statute provides that if the court determines that probable cause exists to seize property, "the court shall order the property restrained by the least restrictive means to protect against disposal, waste, or continued illegal use of such property pending disposition of the forfeiture proceeding." Fla. Stat. § 932.703(2)(d). These means include "a bond or other adequate security equivalent to the value of the property." *Id.*; *cf.* Ariz. Rev. Stat. § 13-4306(G) ("An owner of property seized for forfeiture may obtain the release of the seized property by posting . . . a surety bond or cash . . . ."); Cal. Health & Safety Code § 11492(c) (providing for various remedies to preserve the status quo *pendente lite*, including "a surety bond or undertaking to preserve the property interests of the interested parties"); N.J. Stat. Ann. § 2C:64-3(g) (providing that persons with an interest in property seized for forfeiture, except defendants prosecuted in connection with the seized property, may, after posting a bond, secure release of the property pending the forfeiture action). Again, no protections for a claimant's practical interests in seized property are provided for under the New York forfeiture law.

2. *Seizure of Property of Innocent Owners*

With respect to innocent owners, the City's authority to seize property may be broader than its authority to cause the forfeiture of the property. In the due process context, the Supreme Court has shown special concern for the risk of erroneous deprivation posed to innocent owners. *See James Daniel Good Real Prop.*, 510 U.S. at 55.[15] The impact of

[15] In *Bennis v. Michigan*, 516 U.S. 442 (1996), the Supreme Court held that a state nuisance-abatement law under which authorities sought the forfeiture of a vehicle used for illegal sexual activity did not violate the Due Process Clause of the Fourteenth Amendment by not permitting an innocent co-owner of the vehicle to contest the abatement. *Id.* at 453. Unlike the federal forfeiture law at issue in *James Daniel Good Real*

N.Y.C. Code § 14-140 on innocent owners is vividly illustrated by the predicament of plaintiff Sandra Jones, whose Plymouth van, which she had lent to her estranged husband, was seized in connection with her husband's arrest on drug and weapon charges. Although these charges were later dismissed, Ms. Jones was deprived of her vehicle for some ten months while continuing to make monthly auto payments on the vehicle. Ms. Jones was given no early opportunity to test the probable validity of the City's continued impoundment of her vehicle.

The forfeiture provision operates against those persons who "shall not be deemed to be the lawful claimant" to the property that has been seized by the police department. N.Y.C. Code § 14-140(e)(1).[16] The statute identifies two prin-

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Property, however, the statute in *Bennis* did not provide for an affirmative defense of innocent ownership. Moreover, the Court in *Bennis* suggested that the apparent unfairness of the Michigan law was mitigated by the trial court's "remedial discretion" to consider whether forfeiture of a vehicle would leave its owner or owners without transportation and to order payment of one-half of any sale proceeds to an innocent co-owner. *Id.* at 444-45, 453. We also note that the nuisance-abatement statute in question, Mich. Comp. Laws § 600.3825, authorized "removal" and "sale" of property upon entry of an order of abatement only after the property had been deemed a nuisance in a civil action. *Id.* at 444 n.3. Nothing on the face of the provision, or in the *Bennis* case, suggests that the statute permitted seizure and retention of property prior to adjudication of its status as a nuisance.

[16] This cumbersome construction, defining those subject to forfeiture proceedings in terms of who is *not* a "lawful claimant" to the property, appears to reflect the former practice under which the burden rested on a claimant to bring a civil action in replevin to obtain the return of seized property. *See Hofferman v. Simmons*, 290 N.Y. 449, 454 (1943) ("Since these are replevin actions, we concern ourselves not so much with the [City's] right to hold as with the [claimant's] right to recapture."). In response to a constitutional challenge to the statute, the burden of proof was shifted from the claimant to establish a lawful entitlement, to the City to establish the forfeitability of the property. *McClendon*, 369 F. Supp. at 1394.

cipal groups of those who are not "lawful claimant[s]" and whose property therefore is forfeitable. One is the person who has "used" the property "as a means of committing crime or employed [it] in aid or in furtherance of crime"; the other is the person who "permitted or suffered the same to be used or employed." *Id.*[17]

Thus, the seizure provision authorizes the Property Clerk to take custody, following seizure, of "all property or money suspected of having been used as a means of committing crime," N.Y.C. Code § 14-140(b), without regard to whether or not an owner who took no part in the crime "permitted or suffered" the vehicle to be used as an instrumentality of the crime.[18] A statute that authorizes the police to seize property

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17 The relevant portion of the section provides:

> Where moneys or property . . . have been used as a means of committing crime or employed in aid or in furtherance of crime or held, used or sold in violation of law, . . . a person who . . . so used, employed, sold or held any such moneys or property or permitted or suffered the same to be used, employed, sold or held . . . or a person who derives his or her claim in any manner from or through any such person, shall not be deemed to be the lawful claimant entitled to any such moneys or property . . . .

N.Y.C. Code § 14-140(e)(1). The statute also deems not a lawful claimant any "person who derives his or her claim in any manner from or through any such person." *Id.* This formulation evidently could include other potentially innocent owners and interest holders, such as secured lenders, mortgagees, and lienholders, as well as purchasers, inheritors, and other transferees of property interests.

18 It is not entirely clear whether the City has the burden of proving that the owner "permitted or suffered" a vehicle to be used as an instrumentality of crime, or whether innocent ownership is an affirmative defense to be raised by the claimant. Without deciding that question, we note that we have found one New York state court opinion that has held that the City has the burden. *See Property Clerk v. Pagano*, 170 A.D.2d 30, 35, 573 N.Y.S.2d 658, 661 (1st Dep't 1991) ("[A] proceeding brought under § 14-140 differs substantially from one brought pursuant to a forfeiture statute which expressly places the burden on a claimant to establish his innocent state of mind. Clearly, § 14-140 contains no such language and,

to which the government has not established a legal right or claim, and that on its face contains no limitation of forfeiture liability for innocent owners, raises substantial constitutional concerns.[19] Because plaintiffs in this action seek only a

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on the contrary, must be construed by its own terms to place an affirmative burden on [the City] . . . of proving that respondent 'permitted or suffered' the illegal use of the property.").

[19] Many state statutes, while permitting seizure of forfeitable property, are much more explicit than N.Y.C. Code § 14-140 in limiting or exempting the forfeiture liability of innocent owners. These statutes generally provide for affirmative defenses by innocent owners or make proof of the owners' culpable knowledge part of the seizing authority's burden. For example, a Maine statute that permits forfeiture of a motor vehicle upon a defendant's simultaneous conviction for operating under the influence ("OUI") and operating after suspension for a prior OUI conviction, requires that the defendant be the "sole owner-operator of that vehicle." Me. Rev. Stat. Ann. tit. 29-A, § 2421(1); *see also State v. One Blue Corvette*, 732 A.2d 856 (Me. 1999) (holding that the statutory requirement that defendant be the "sole owner-operator of that vehicle" precluded forfeiture of a vehicle jointly owned by defendant's wife). Other state statutes contain express exceptions for a variety of innocent parties: Ariz. Rev. Stat. § 13-4304(1)-(2), (4)-(5) (common carriers; owners whose vehicles were "unlawfully in the possession of a person other than the owner" during commission or omission of an act; owners who "did not know and could not reasonably have known of the act or omission"; and bona fide purchasers for value "not knowingly taking part in an illegal transaction" and "reasonably without notice of the act or omission giving rise to forfeiture"); Cal. Health & Safety Code §§ 11470(e)-(h) (persons other than defendant with a community property interest in the vehicle; bona fide purchasers and encumbrancers), 11488.5(e) (owners who did not have "actual knowledge that the seized property would be or was used for a purpose for which forfeiture is permitted and consented to that use"); Fla. Stat. § 932.703(6)-(7) (spouses, lienholders, lessors, joint owners, and other parties lacking knowledge of the criminal activity alleged); N.J. Stat. Ann. § 2C:64-5(a)-(b) (unwitting lessors and security-interest holders; owners who show that they were "not involved in or aware of the unlawful activity and . . . had done all that could reasonably be expected to prevent the proscribed use of the property by an agent"); La. Rev. Stat. Ann. § 14:98(D)(2)(b) (unwitting owners; owners of stolen vehicles); Minn. Stat. § 169A.63(7) (unwitting owners, bona fide security-interest holders, and lessors). Notably, New York state civil forfeiture statutes likewise provide a defense for innocent owners. *See* N.Y. C.P.L.R. 1311(4)(d)(ii)-(iii) (innocent persons subject to "adverse

prompt and effective means to test the legitimacy of and justification for the City's retention of their vehicles following the seizure but prior to the forfeiture proceeding, we have no occasion to rule on the constitutionality of the seizure provision itself. Nevertheless, the scope of the police seizure authority granted under § 14-140(b), together with the City's "direct pecuniary interest in the outcome of the proceeding," *James Daniel Good Real Prop.*, 510 U.S. at 55-56, further convinces us of the need to provide a prompt opportunity for independent and neutral judicial review of the probable validity of the City's retention of vehicles *pendente lite*.[20]

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impact of a forfeiture"; defendants acquitted of the underlying crime), 1311(3)(b)(iv) (non-criminal defendants who either did not know "that the instrumentality was or would be used in the commission of a crime" or did not knowingly obtain an "interest in the instrumentality to avoid forfeiture"). In *Property Clerk v. Ferris*, 77 N.Y.2d 428, 431, 568 N.Y.S.2d 577, 579 (1991), the New York Court of Appeals stated that the "interests of justice" exception in N.Y. C.P.L.R. 1311 "is 'unique' . . . and nothing in the article suggests that it applies in the limited forfeiture proceedings available pursuant to Administrative Code § 14-140"; *see also Property Clerk v. Deans Overseas Shippers, Inc.*, 275 A.D.2d 204, 205-06, 712 N.Y.S.2d 492, 493 (1st Dep't 2000) (same).

Moreover, in contrast to § 14-140, the primary federal civil drug forfeiture statute, 21 U.S.C. § 881, contained an express "innocent owner" defense, which stated that "no conveyance shall be forfeited . . . to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner." 21 U.S.C. § 881(a)(4)(C). Replacing this provision, the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified as amended at 18 U.S.C. § 983), creates a uniform innocent owner defense whereby a claimant may affirmatively prove innocent ownership by a preponderance of the evidence. 18 U.S.C. § 983(d). The statute specifically mentions owners who "did not know of the conduct giving rise to forfeiture"; bona fide purchasers or sellers for value; claimants who acquired a property interest through marriage, divorce, or legal separation; spouses or legal dependents who acquired property by inheritance or probate; and joint tenants and others with a partial interest in property.

[20] In contrast, for orders of attachment granted without notice under New York state civil forfeiture law, contained at N.Y. C.P.L.R. art. 13-A, the

In sum, there is a heightened potential for erroneous retention where an arrestee, whether for DWI or some other suspected criminal conduct, is not the owner of the seized vehicle. The plight of innocent owners, as exemplified by the experience of plaintiff Sandra Jones, persuades us that an early retention hearing following seizure under N.Y.C. Code § 14-140 is constitutionally required.

3. *Other Suggested Remedies Do Not Provide Prompt Post-Seizure Review.*

In prosecuting vehicle forfeiture actions under N.Y.C. Code § 14-140, the City has consistently opposed motions for interim relief in the form of a retention hearing. For example, in its Memorandum of Law opposing a motion for an "immediate retention hearing" in the case of *Property Clerk v. Ali*, the City stated that

> under the CPLR there is no basis upon which defendant can even make this motion. Likewise, the CPLR does not provide for such a hearing. Defendant has circumvented the traditional rules of civil procedure by asking this court to entertain, and plaintiff to defend, against a

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claiming authority must move for a hearing within five days of the seizure. N.Y. C.P.L.R. 1317, 1329 (providing for *ex parte* attachment of assets for five days, after which the attaching authority must move for an order confirming the attachment and permitting the defendant to challenge the attachment, with the burden of proof on the attaching authority to establish the grounds for the attachment, its need, and the probability of success on the merits). In upholding these provisions against doubts as to the constitutionality under the Fourteenth Amendment of *ex parte* prejudgment attachment, the New York Court of Appeals relied, *inter alia*, on available means to challenge promptly the basis for the attachment. *Morgenthau v. Citisource, Inc.*, 68 N.Y.2d 211, 222, 508 N.Y.S.2d 152, 157 (1986). N.Y. C.P.L.R. art. 13-A "does not limit or supersede" N.Y.C. Code § 14-140, however, and applies only to felonies and therefore has been held not to apply to forfeitures under § 14-140. *Grinberg*, 181 Misc. 2d at 449, 694 N.Y.S.2d at 320-21 (quotation marks omitted).

> motion that has no legal basis and a hearing that would clearly be improper under the rules.

Memorandum of Law in Support of Plaintiff's Opposition to an Immediate Retention Hearing, at 12, *Property Clerk v. Ali*, No. 413408/99 (Sup. Ct. N.Y. Co.). In *Ali*, as here, the City maintained that due process was satisfied by a resolution of the merits at the eventual civil forfeiture hearing.

Nevertheless, defendants here suggest that plaintiffs may assert their constitutional rights and challenge the City's continued retention of their vehicles through the procedural means of a Request for Judicial Intervention ("RJI") or an Article 78 proceeding brought under New York state law. We disagree. Under current law, any review of the legitimacy of the City's continued retention of a vehicle would likely come, at the earliest, months after its seizure. This delay is a result, first, of the City's need to initiate forfeiture proceedings. Assuming that a claimant requests the return of the property immediately upon seizure by the police, the City has twenty-five days in which to initiate proceedings. Only after a civil forfeiture proceeding is commenced and process is served can an owner submit a RJI. *See* 22 N.Y. Comp. Codes R. & Regs. § 202.6(a). Along with the RJI, a claimant files a request for a preliminary conference. *See id.* § 202.12(a) ("If the action has not been assigned to a judge, the party shall file a request for judicial intervention together with the request for a preliminary conference."). Under the New York rules, a "preliminary conference" is held no later than forty-five days from the request "unless the court orders otherwise." *Id.* § 202.6(b). The rules do not explicitly permit a determination of probable cause or the legitimacy of continued retention at the preliminary conference, or even provide for the taking of evidence, indicating that, at most, the preliminary conference may serve (as plaintiffs suggest) to

set a future date for a probable cause hearing.[21] Under the current rules, therefore, any determination of probable cause for the initial seizure or the legitimacy of continued deprivation might come sometime within three months after the seizure, or perhaps much later.[22] The Fourth and Fourteenth Amendments demand a more expeditious determination of a vehicle owner's rights.

The City also suggests that an Article 78 proceeding under New York state law is available to claimants to redress any constitutional grievances. Requiring plaintiffs to resort to an Article 78 proceeding, however, would place the onus on each plaintiff to bring a separate civil action in order to force the City to justify its seizure and retention of a vehicle. This civil action provides the "[r]elief previously obtained by writs of certiorari to review, mandamus or prohibition." N.Y. C.P.L.R. 7801. To petition for mandamus, a claimant would have the burden of showing a clear legal right to the release of his or her vehicle. *See Ass'n of Surrogate & Sup. Ct. Reporters v. Bartlett*, 40 N.Y.2d 571, 574, 388 N.Y.S.2d 882, 884 (1976) ("[P]etitioners' success in this proceeding in the nature of mandamus requires a showing of a clear legal right to the relief sought.") (quotation marks omitted).

The City cites *Grinberg v. Safir* as proof that relief is currently available in an Article 78 proceeding. To challenge the City's forfeiture proceeding and retention of his vehicle, the petitioner in *Grinberg* filed an Article 78 action and, with it,

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[21] The New York court rules include among "matters to be considered" at the conference the simplification of issues, setting a schedule for discovery, addition of necessary parties, and settlement, 22 N.Y. Comp. Codes R. & Regs. § 202.12(c)(1)-(4), and "any other matters that the court may deem relevant," *id.* § 202.12(c)(5).

[22] Plaintiffs have represented that, in the New York Supreme Court, First Judicial Department, Civil Branch, all forfeiture actions under N.Y.C. Code § 14-140 are assigned to the same judge, making further delays likely.

a request for a temporary restraining order. Although the court held argument only two days after the action was filed, it denied the temporary restraining order, observing that "[l]ikely inconvenience is not proof of immediate and irreparable injury," *Grinberg*, 181 Misc. 2d at 447 n.1, 694 N.Y.S.2d at 320 n.1, and eventually decided the case in favor of the City more than two months later.

In sum, we conclude that the suggested remedy of an Article 78 proceeding does not provide a prompt and effective means for claimants to challenge the legitimacy of the City's retention of their vehicles *pendente lite*. *Cf. Fuentes*, 407 U.S. at 80 (finding unconstitutional a Pennsylvania statute that "allows a post-seizure hearing if the aggrieved party shoulders the burden of initiating one"). Furthermore, inasmuch as plaintiffs claim that the federal Constitution requires the state court to offer a remedy that is currently not available under state or local law, this constitutional challenge need not proceed through the state court before it reaches the federal courts. *See Kraebel v. N.Y. City Dep't of Hous. Pres. & Dev.*, 959 F.2d 395, 404-06 (2d Cir. 1992) (addressing the claim that an Article 78 proceeding provided all the process plaintiff was due, and finding that "[i]t is well-established that [42 U.S.C.] § 1983 generally allows plaintiffs with federal or constitutional claims the right to sue in federal court without first resorting to state judicial remedies"); *cf. Logan*, 455 U.S. at 432 ("Each of our due process cases has recognized, either explicitly or implicitly, that because minimum procedural requirements are a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.") (quotation marks and alterations omitted).

IV. *The* Mathews v. Eldridge *Inquiry*

The Supreme Court has set forth three factors to weigh in deciding whether the demands of the Due Process Clause are satisfied where the government seeks to maintain possession of property before a final judgment is rendered. *See Mathews*, 424 U.S. at 335. These factors should be used to evaluate the adequacy of process offered in post-seizure, pre-judgment deprivations of property in civil forfeiture proceedings. *Cf. James Daniel Good Real Prop.*, 510 U.S. at 53 (finding that the *Mathews* inquiry "provides guidance" in determining whether to "tolerate" an exception to the rule requiring pre-deprivation notice and hearing). The factors include (1) the private interest affected; (2) the risk of erroneous deprivation through the procedures used and the value of other safeguards; and (3) the government's interest.

A. *The Private Interest Affected*

The first factor to be considered in the *Mathews* inquiry is "the private interest affected by the official action." *Mathews*, 424 U.S. at 335. The deprivation of real or personal property involves substantial due process interests. *See James Daniel Good Real Prop.*, 510 U.S. at 53-54 (recognizing that "Good's right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance"); *id.* at 81 (Thomas, J., concurring in part and dissenting in part) (agreeing with the majority that "[i]ndividual freedom finds tangible expression in property rights"); *Doehr*, 501 U.S. at 11 ("[T]he property interests that attachment affects are significant."); *Fuentes*, 407 U.S. at 70-71 (holding that loss of household furniture and appliances warrants a pre-deprivation hearing).

The particular importance of motor vehicles derives from their use as a mode of transportation and, for some, the

means to earn a livelihood. An "individual has an important interest in the possession of his [or her] motor vehicle," which is "often his [or her] most valuable possession." *Lee*, 538 F.2d at 31; *see also Perry v. McDonald*, 280 F.3d 159, 174 (2d Cir. 2001) (noting that an individual's interest in driving a vehicle represents a due process concern); *Coleman v. Watt*, 40 F.3d 255, 260-61 (8th Cir. 1994) (stating, in the course of applying the *Mathews* factors to impoundment of a car under state law, that "[a]utomobiles occupy a central place in the lives of most Americans, providing access to jobs, schools, and recreation as well as to the daily necessities of life"); *Stypmann v. City & County of San Francisco*, 557 F.2d 1338, 1342-43 (9th Cir. 1977) (finding a "substantial" interest in the "uninterrupted use of an automobile," upon which the owner's "ability to make a living" may depend); *cf.* Justice Robert H. Jackson, *The Task of Maintaining Our Liberties: The Role of the Judiciary*, 39 A.B.A.J. 961, 963 (1953) ("My equal right to drive an automobile may be only a claim to use of property, but it concerns my personal freedom as well.").

Other considerations as well bear on the importance of the private interest at stake. One is the availability of hardship relief under the applicable law. *Cf. Dixon v. Love*, 431 U.S. 105, 113 (1977) (noting the availability, under an Illinois statute, of provisions for "hardship and for holders of commercial licenses, who are those most likely to be affected by the deprival of driving privileges"). Under the New York City Civil Administrative Code, no provision is made for situations in which the seizure and retention of a vehicle would cause particular hardship. *See* N.Y.C. Code § 14-140 (authorizing seizure of all property used as an instrumentality of crime).[23] Another consideration is the length of deprivation,

[23] In contrast, a provision of the federal civil forfeiture statute allows release of property *pendente lite* under certain circumstances, including

which increases the weight of an owner's interest in possessing the vehicle. *See Logan*, 455 U.S. at 434 (noting the Court's concern under *Mathews* for "the importance of the private interest and the length or finality of the deprivation"). As noted above, the City retains seized vehicles for months or sometimes years before the merits of a forfeiture action are addressed. Finally, the importance of the claimant's possessory interest post-seizure and pre-judgment is not diminished by the likelihood that the government will eventually prevail in forfeiture proceedings. *See James Daniel Good Real Prop.*, 510 U.S. at 62 ("Fair procedures are not confined to the innocent. The question before us is the legality of the seizure, not the strength of the Government's case."); *Fuentes*, 407 U.S. at 87 ("The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing.").

For these reasons, we cannot agree with the district court's cursory assessment of the interest at stake based solely on its observation that the seizure of the vehicles occurred "in a jurisdiction that abounds in mass transit facilities." *Krimstock*, 2000 WL 1702035, at *6. The seizure authority under the statute extends not only to cars registered in New York City, but to any found there; it also encompasses com-

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when "continued possession by the Government . . . will cause substantial hardship to the claimant, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless; [and] the claimant's likely hardship . . . outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding." 18 U.S.C. § 983(f)(1)(C)-(D). Similarly, N.Y. C.P.L.R. 1311(4)(d) permits the dismissal or mitigation of a forfeiture action "in the interests of justice"—for example, in light of "the seriousness and circumstances of the crime to which the property is connected relative to the impact of forfeiture of property upon the person who committed the crime." As noted earlier, however, N.Y. C.P.L.R. 1311 does not apply to "the limited forfeiture proceedings available pursuant to Administrative Code § 14-140." *Ferris*, 77 N.Y.2d at 431, 568 N.Y.S.2d at 579.

mercial as well as noncommercial vehicles. If the named class members serve as any indication, motor vehicle use is often found among those for whom mass transportation is inadequate. Valerie Krimstock, for example, states that the seizure of her vehicle hindered her from traveling from her residence in the Bronx to her job in North Tarrytown and from visiting her daughter who suffers from mental illness and lives in Pennsylvania. The seizure and retention of Clarence Walters' vehicle made it difficult, he reports, to reach his construction job sites—some located in areas of Long Island or New Jersey inaccessible by mass transit—and as a consequence he lost a certain amount of work. James Webb, a 77-year-old retiree, states that the seizure and retention of his vehicle made it difficult for him and his wife to see their doctors and to visit friends, and prevented him from driving his granddaughter to school.

B. *The Risk of Erroneous Deprivation Through the Procedures Used and the Probable Value of Other Safeguards*

The second factor to be considered under the *Mathews* test is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335. The particular deprivation with which we are concerned here is the City's post-seizure, pre-judgment retention of plaintiffs' vehicles. The district court concluded that the procedures used by the City—a warrantless arrest and the ultimate forfeiture proceeding—adequately protect plaintiffs against erroneous deprivation of their vehicles. *Krimstock*, 2000 WL 1702035, at *6-*7. We are troubled by this conclusion. Neither the arresting officer's unreviewed probable cause determination nor a court's ruling in the distant future on the merits of the City's forfeiture claim can fully protect against an erroneous deprivation of a claimant's

possessory interest as his or her vehicle stands idle in a police lot for months or years.

Nevertheless, we conclude that, on balance, the second *Mathews* factor weighs in favor of the City. We acknowledge that the risk of erroneous seizure and retention of a vehicle is reduced in the case of a DWI owner-arrestee, because a trained police officer's assessment of the owner-driver's state of intoxication can typically be expected to be accurate. *See People v. Bennett*, 238 A.D.2d 898, 899, 660 N.Y.S.2d 772, 774 (4th Dep't 1997) (holding that the court properly "instruct[ed] jurors that the police officers were experts in determining a person's state of intoxication").

Yet the City's victory on the second *Mathews* factor is a narrow one. As noted earlier, the risk of erroneous deprivation that is posed to innocent owners is a substantial one. Moreover, our inquiry into the risk of error is partly informed by the City's pecuniary interest in the outcome of § 14-140 proceedings. As the Supreme Court has observed, greater procedural safeguards are "of particular importance . . . where the Government has a direct pecuniary interest in the outcome of the proceeding." *James Daniel Good Real Prop.*, 510 U.S. at 55-56; *cf. United States v. Funds Held in the Name or for the Benefit of Wetterer*, 210 F.3d 96, 110 (2d Cir. 2000) ("We have previously observed the government's 'virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes.' ") (quoting *United States v. Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992)).[24] Under the City's Administrative

[24] On several occasions, the Second Circuit has stressed that "[f]orfeiture is a harsh and oppressive procedure which is not favored by the courts." *United States v. $31,990 in U.S. Currency*, 982 F.2d 851, 856 (2d Cir. 1993) (quotation marks omitted); *cf. United States v. Lasanta*, 978 F.2d 1300, 1305 (2d Cir. 1992) ("While congress may have intended civil forfeiture to be a powerful weapon in the war on drugs, it would, indeed, be a Pyrrhic victory for the country, if the government's relentless and imag-

Code, property found to have "been used as a means of committing crime or employed in aid or in furtherance of crime" may, at the discretion of the police commissioner, "be used or converted to use for the purpose of the [police] department or any city, state or federal agency." N.Y.C. Code § 14-140(e)(2); *see also Hyne*, 147 Misc. 2d at 780, 557 N.Y.S.2d at 248 (noting that the forfeiture law's "remedial purposes" include the fact that "revenue is generated and applied toward the cost of law enforcement").[25]

The Supreme Court has expressed additional concern when, as here, the "erroneous deprivation" cannot be recompensed by the claimant's prevailing in later proceedings:

> [T]he availability of a postseizure hearing may be no recompense for losses caused by erroneous seizure. Given the congested civil dockets in federal courts, a claimant

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inative use of that weapon were to leave the constitution itself a casualty.") (internal quotation marks and citations omitted), *abrogated on other grounds*, *Florida v. White*, 526 U.S. 559 (1999).

[25] Some state statutes expressly admonish against governmental opportunism in seizing and forfeiting property. *See* Cal. Health & Safety Code § 11469(a) ("Law enforcement is the principal objective of forfeiture. Potential revenue must not be allowed to jeopardize the effective investigation and prosecution of criminal offenses, officer safety, the integrity of ongoing investigations, or the due process rights of citizens."); *id.* § 11469(f) ("Seizing agencies shall avoid any appearance of impropriety in the sale or acquisition of forfeited property."); Fla. Stat. § 932.704(1) ("It is the policy of this state that law enforcement agencies shall utilize the provisions of the Florida Contraband Forfeiture Act to deter and prevent the continued use of contraband articles for criminal purposes while protecting the proprietary interests of innocent owners and lienholders and to authorize such law enforcement agencies to use the proceeds collected . . . as supplemental funding for authorized purposes. The potential for obtaining revenues from forfeitures must not override fundamental considerations . . . . It is also the policy of this state that law enforcement agencies ensure that, in all seizures made under [the Act], their officers adhere to federal and state constitutional limitations regarding an individual's right to be free from unreasonable searches and seizures . . . .").

> may not receive an adversary hearing until many months after the seizure. And even if the ultimate judicial decision is that the claimant was an innocent owner, or that the Government lacked probable cause, this determination, coming months after the seizure, "would not cure the temporary deprivation that an earlier hearing might have prevented."

James Daniel Good Real Prop., 510 U.S. at 56 (quoting *Doehr*, 501 U.S. at 15); *cf. Shapiro*, 424 U.S. at 629 (noting that where irreparable injury may result from a deprivation of property *pendente lite*, "the Due Process Clause requires . . . an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation must be made"). In contrast, for example, to benefits for which full retroactive relief is awarded if a plaintiff ultimately prevails, *see, e.g.*, *Mathews*, 424 U.S. at 340, an owner cannot recover the lost use of a vehicle by prevailing in a forfeiture proceeding. The loss is felt in the owner's inability to use a vehicle that continues to depreciate in value as it stands idle in the police lot. *Cf. Property Clerk v. Duck Jae Lee*, 183 Misc. 2d 360, 363, 702 N.Y.S.2d 792, 795 (Sup. Ct. N.Y. Co. 2000) (permitting a secured lender to intervene in a vehicle forfeiture proceeding brought against a DWI arrestee who had defaulted on monthly car payments, so that "the value of the subject car will not continue to depreciate if plaintiff lets the action languish").

In sum, because we recognize that the risk of erroneous deprivation in the context of DWI owner-arrestees is in many cases a reduced one, we conclude that the second *Mathews* factor weighs in favor of the City. The scales are very nearly in equipoise, however, in light of the comparably greater risk of error that is posed to innocent owners, the City's direct pecuniary interest in the outcome of forfeiture proceedings,

and the lack of adequate recompense for losses occasioned by erroneous seizures of vehicles.

C. *The Government's Interest*

The third *Mathews* factor examines "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. The City argues that it has three principal interests in continuing to retain the vehicles post-seizure and pre-judgment.

The first, and the most compelling among those the City has adduced, is to prevent a vehicle from being sold or destroyed before a court can render judgment in future forfeiture proceedings. The City cites *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), for the proposition that when property is easily transportable to another jurisdiction, the City must retain custody pending resolution of the forfeiture proceedings. The Supreme Court, indeed, recognized that immediate seizure was necessary in *Calero-Toledo* because otherwise the yacht at issue "might have disappeared had the Government given advance warning of the forfeiture action." *James Daniel Good Real Prop.*, 510 U.S. at 57. We note initially that the Puerto Rican statute under which the yacht in *Calero-Toledo* was seized and forfeited provided that notice of the seizure must be served upon interested parties within ten days following the seizure and that those parties have fifteen days following service within which to challenge the seizure by serving a complaint on the confiscating officer. The complaint, filed in the Superior Court, "shall be heard without subjection to docket." 34 P.R. Laws Ann. § 1722(a) (repealed 1988). In *Calero-Toledo*, the yacht was automatically forfeited when no challenge was made to the seizure within fifteen days after service of the notice of seizure. *Calero-Toledo*, 416 U.S. at 668.

The critical difference between *Calero-Toledo* and the present case is that plaintiffs' vehicles have already been seized and are in the hands of the police. Just as with real property seized by the government in forfeiture proceedings, there is no danger that these vehicles will abscond. *See James Daniel Good Real Prop.*, 510 U.S. at 56-57 (discussing the need for seizure of movable property). Plaintiffs seek a determination only of whether *continued* retention of their vehicles by the City is valid and justified. Continued retention may be unjustified when other means of restraint would accomplish the City's goals. *See id.* at 59 ("In the usual case, the Government . . . has various means, short of seizure, to protect its legitimate interests" in forfeitable property). To ensure that the City's interest in forfeitable vehicles is protected, claimants could post bonds, or a court could issue a restraining order to prohibit the sale or destruction of the vehicle. *See id.* at 58-59 (suggesting judicial means to ensure that real property is not sold or destroyed *pendente lite*).[26] The need to prevent forfeitable property from being sold or destroyed during the pendency of proceedings does not necessarily justify continued retention of all vehicles when other means of accomplishing those goals are available. A bond is in some respects a superior form of security because it entails no storage costs or costs of sale.

A second reason offered by the City for maintaining custody of vehicles prior to judgment in forfeiture proceedings is that the City's *in rem* jurisdiction over the vehicles depends upon its unbroken possession from seizure to judgment. The Supreme Court has held, however, that possession

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[26] We note that in contrast to the forfeiture statute at issue in the present case, the Puerto Rican statute in *Calero-Toledo* required that seized motor vehicles be appraised for their monetary value by the Office of Transportation and that plaintiffs "have the right to give bond . . . to answer for the seizure if the lawfulness of the latter is upheld." 34 P.R. Laws Ann. § 1722(b) (repealed 1988).

of a *res* during the entire course of the proceedings is unnecessary to preserve jurisdiction. *See Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 88-89 (1992) ("We hold that, in an *in rem* forfeiture action, the Court of Appeals is not divested of jurisdiction by the prevailing party's transfer of the *res* from the district."). Noting that the *in rem* rules had their origin in admiralty law, where a court established its jurisdiction by seizure, the Supreme Court found that "the court must have actual or constructive control of the *res* when an *in rem* forfeiture is *initiated*." *Id.* at 87 (emphasis added); *cf. The Palmyra*, 25 U.S. (12 Wheat.) 1, 10 (1827) (Story, J.) ("Whenever a stipulation [bond] is taken in an admiralty suit, for the property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators liable to the exercise of all those authorities on the part of the Court, which it could properly exercise if the thing itself were still in its custody.").[27]

The final interest adduced by the City is the need to prevent the offending *res*—here, the seized vehicle—from being used as an instrumentality in future acts of driving while intoxicated. Of course, at the time of initial seizure and retention the "offending *res*" is only an allegedly offending *res*, inasmuch as the owner's or owner-arrestee's misconduct in connection with the instrumentality has yet to be established in either a criminal or a civil proceeding. Moreover, although the Supreme Court has found that certain situations of "executive urgency," *James Daniel Good Real Prop.*, 510 U.S. at 60, call for action that dispenses with normal due process guarantees, this case does not fall within that narrow category. In defining situations of "executive urgency," the Court has provided the examples of summary seizures during

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[27] In addition, we note that the City does not caption these civil forfeiture actions as proceedings *in rem*. Instead, they are styled as *in personam* actions—for example, *Property Clerk v. Ismael Delapaz*.

wartime, seizures of contaminated food, and, formerly, the collection of taxes when the very existence of the government depended upon them. *See id.* at 59-60. To take one example, the Court allowed the seizure, without prior judicial process, of forty-seven barrels of poultry from a Chicago food storage warehouse after city inspectors determined they were "putrid, decayed, poisonous, or infected in such a manner as to render it unsafe or unwholesome for human food." *N. Am. Cold Storage Co v. City of Chicago*, 211 U.S. 306, 308 (1908). The threat to the public was immediate, and the spoiled poultry, like contraband, was unlikely to be used for some other legitimate purpose. Motor vehicles, in contrast, present no such threat and maintain their usefulness. *Cf. Austin v. United States*, 509 U.S. 602, 621 (1993) (" 'There is nothing even remotely criminal in possessing an automobile.' ") (quoting *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965)). In *James Daniel Good Real Property*, for example, the Supreme Court found that enforcement of the drug forfeiture laws did not present "a plausible claim of urgency" strong enough to dispense with normal due process guarantees. *James Daniel Good Real Prop.*, 510 U.S. at 61.

Even if driving while intoxicated were considered a matter of "executive urgency," the response the City has chosen, requiring the impoundment of vehicles until forfeiture proceedings are terminated, is ill-suited to address the urgency. While initial seizure of a vehicle serves the constructive purpose of keeping an individual from driving in an inebriated condition, that purpose often loses its basis in urgency once the individual has regained sobriety on the morrow.[28] Furthermore, the remedy of continued impoundment leaves the alleged offender free to drive while intoxicated in any other

[28] A claimant's proven history of persistent drunkenness or repeated DWI violations, however, might justify a fact-finder in denying release of the vehicle *pendente lite*.

vehicle when the opportunity presents itself, while depriving some potentially innocent owners of the often indispensable benefits of daily access to their vehicles.

Finally, the City's asserted interest in removing dangerous drivers from the road is weakened if it extends not to all vehicles seized in connection with DWI arrests, but only to those that might yield an attractive price at auction. The November 1988 Forfeiture Guide produced by the Legal Bureau of the City of New York Police Department instructs that "[c]ertain categories of property do not warrant forfeiture litigation due to their small value or the near impossibility of a successful outcome," including "[n]on-owner operated vehicles ten years old or older," unless, *inter alia*, "the vehicle has a special value, e.g., an expensive import." 1988 Forfeiture Guide, at 24-25. We do not know whether this passage reflects current policy, but we note that the City's interest in safety cannot be paramount if it seeks to remove from the road only a lucrative subset of the vehicles seized from intoxicated drivers.

D. *Balancing the* Mathews v. Eldridge *Factors*

Balancing the *Mathews* factors, we find that the Fourteenth Amendment guarantee that deprivations of property be accomplished only with due process of law requires that plaintiffs be afforded a prompt post-seizure, pre-judgment hearing before a neutral judicial or administrative officer to determine whether the City is likely to succeed on the merits of the forfeiture action and whether means short of retention of the vehicle can satisfy the City's need to preserve it from destruction or sale during the pendency of proceedings.

In *James Daniel Good Real Property*, the Supreme Court concluded that to seize real property without notice and hearing, the "Government must show that less restrictive measures—*i.e.*, a *lis pendens*, restraining order, or bond—would

not suffice to protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property." *James Daniel Good Real Prop.*, 510 U.S. at 62; *cf. Statewide Auto Parts*, 971 F.2d at 905 (urging district courts "whenever possible . . . [to] favor less drastic measures, such as occupancy agreements, bonds, receiverships, lis pendens, or other means for preserving the *status quo ante* seizure until the criminality underlying the claimed forfeiture can be established in the context of a proper criminal proceeding with its attendant constitutional protections to the accused").[29] Here, once the vehicles have been seized,

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[29] In *Statewide Auto Parts*, this Court considered a due process challenge to the federal government's seizure of real and personal commercial properties pursuant to an *ex parte* warrant and the federal civil forfeiture statute. *Statewide Auto Parts*, 971 F.2d at 898-99. In other cases involving seizure of real property, this Court has been careful to emphasize the value of less drastic means than seizure for protecting the government's interest in forfeitable property. *See, e.g., United States v. Premises & Real Property at 4492 South Livonia Road, Livonia, N.Y.*, 889 F.2d 1258, 1265 (2d Cir. 1989) ("Any exigency that might be posed by the threat of an encumbrance on, or transfer of, the property may be met by less restrictive means than seizure, for example, by the filing of a lis pendens, as was done in this case, along with a restraining order or bond requirement."); *see also United States v. Puello*, 814 F. Supp. 1155, 1164 (E.D.N.Y. 1993) (stating that, "[m]indful of [the Second Circuit's] warning [to use less restrictive means than outright seizure], the Court has explored the possibility of these less drastic means with the parties."); *United States v. Joseph Health & Beauty Supply*, 807 F. Supp. 323, 325 (S.D.N.Y. 1992) (permitting a claimant to occupy seized business premises for the conduct of lawful business pending trial, as a less restrictive measure than outright seizure of the leasehold under federal forfeiture law); *cf.* 18 U.S.C. § 983(f)(7), (j) (providing for restraining orders, injunctions, bonds and other means to preserve property during litigation); Supplemental Rules for Certain Admiralty and Maritime Claims, Rule E(4)(f) (providing, except where the United States is seeking forfeiture, for a "prompt hearing at which the plaintiff shall be required to show why the arrest or attachment [of property] should not be vacated or other relief granted consistent with these rules"); Fla. Stat. § 932.703(d) (providing that, if the court determines that probable cause exists to believe that property was used in violation of the state contraband forfeiture statute, "the

and concerns for establishing jurisdiction and immediate prophylactic custody are satisfied, we find that the Due Process Clause requires that claimants be given an early opportunity to test the probable validity of further deprivation, including probable cause for the initial seizure, and to ask whether other measures, short of continued impoundment, would satisfy the legitimate interests of the City in protecting the vehicles from sale or destruction *pendente lite*. Whether the vehicle is in the hands of the police the morning after it has been seized, as in this case, or whether James Daniel Good's property is still in his hands the morning before the marshals arrive with a warrant, the question is what reason the government has for refusing to exercise some means short of continued retention after seizure to guarantee that property will be available to satisfy a civil forfeiture judgment.

E. *Inapplicability of* United States v. $8,850 *and the Speedy Trial Test*

The City argues that the *Mathews v. Eldridge* balancing test is displaced by the Supreme Court's decision to apply the speedy trial test, and not the *Mathews* inquiry, in examining the constitutionality of any delay in the return of property subject to future civil forfeiture proceedings. *See United States v. $8,850*, 461 U.S. 555 (1983) (applying the speedy trial test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), in finding that an eighteen-month delay in filing a customs forfeiture action did not violate constitutional due process guarantees).

We disagree. As discussed in Section III.A above, plaintiffs' claim does not concern the speed with which civil forfeiture proceedings themselves are instituted or conducted.

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court shall order the property restrained by the least restrictive means to protect against disposal, waste, or continued illegal use," including such means as a "bond or other adequate security equivalent to the value of the property").

Instead, plaintiffs seek a prompt post-seizure opportunity to challenge the legitimacy of the City's retention of the vehicles while those proceedings are conducted. The application of the speedy trial test presumes prior resolution of any issues involving probable cause to commence proceedings and the government's custody of the property or persons *pendente lite*, leaving only the issue of delay in the proceedings. The impoundment of property—or the incarceration of a criminal defendant—certainly increases the hardship worked by any delay. The Constitution, however, distinguishes between the need for prompt review of the propriety of continued government custody, on the one hand, and delays in rendering final judgment, on the other.[30]

V. *The Prompt Vehicle Retention Hearing*

As a remedy, we order that claimants be given a prompt post-seizure retention hearing, with adequate notice,[31] for

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[30] We also note that this Court has observed, in the context of the federal forfeiture laws, that "under the *Barker* [speedy trial] test, which we think applies to the holding of the forfeiture trial as well as to the filing of the action, there is a due process violation at some point." *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1163 (2d Cir. 1986). "The Government argues that, once an action is filed, delays of any length may be granted to allow completion of related criminal proceedings. To require prompt filing of a forfeiture action but allow indefinite postponement of the trial would reduce the filing requirement to a nullity." *Id.*

[31] Pursuant to 38-A R.C.N.Y. § 12-32, the voucher issued to an arrestee by the police upon arrest and seizure must notify the arrestee of procedures for demanding the return of property and the possible actions that the Property Clerk may take after the demand has been made. *See also Butler v. Castro*, 896 F.2d 698, 702 (2d Cir. 1990) ("[A] voucher must be given to an arrestee for non-contraband property seized [and] must also give notice of the procedures to be followed to recover such property."). Adequate notice of the right to a post-seizure retention hearing could readily be added to this information. This procedure may not be adequate, however, where the arrestee and the vehicle owner are not the same person.

motor vehicles seized as instrumentalities of crime pursuant to N.Y.C. Code § 14-140(b).[32] There is no universal approach to satisfying the requirements of meaningful notice and opportunity to be heard in a situation such as this. *See Fuentes*, 407 U.S. at 96 (acknowledging that the "nature and form of [fair prior hearings] are legitimately open to many potential variations"); *cf. Green v. County Sch. Bd.*, 391 U.S. 430, 439 (1968) ("There is no universal answer to the complex problems of desegregation; there is obviously no one plan that will do the job in every case."); *Int'l Salt Co. v. United States*, 332 U.S. 392, 400-01 (1947) ("The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case."). Moreover, the cost of additional procedures and the details of their implementation are matters peculiarly suited to the experience of the district court and the knowledge of the parties. Therefore, as we did in *McClendon*, 460 F.2d at 116, we leave it to the district court, in consultation with the parties, to fashion appropriate procedural relief consistent with this opinion. *See Fuentes*, 407 U.S. at 97 n.33 ("Leeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing . . . ."); *cf. United States v. City of Yonkers*, 197 F.3d 41, 57 (2d Cir. 1999) (noting that a district court has "broad equitable discretion to apportion remedial costs" in desegregation cases).

Although we decline to dictate a specific form for the prompt retention hearing, we hold that, at a minimum, the

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[32] We note that both parties appear to agree that plaintiffs' vehicles were not seized as "arrest evidence" pursuant to N.Y.C. Code § 14-140(b) but rather as instrumentalities of crime. According to the City: "The seven named plaintiffs [have had their vehicles] impounded and held by the Property Clerk for forfeiture, because they were used in furtherance of a crime." In any event, it is hard to imagine how an arrestee's vehicle could serve as evidence in the ordinary DWI case.

hearing must enable claimants to test the probable validity of continued deprivation of their vehicles, including the City's probable cause for the initial warrantless seizure. In the absence of either probable cause for the seizure or post-seizure evidence supporting the probable validity of continued deprivation, an owner's vehicle would have to be released during the pendency of the criminal and civil proceedings.

We hasten to point out that we do not envision the retention hearing as a forum for exhaustive evidentiary battles that might threaten to duplicate the eventual forfeiture hearing.[33] Inasmuch as the purpose of the hearing is the limited one of determining whether the vehicle should be returned to its owner during the pendency of proceedings, due process should be satisfied by an initial testing of the merits of the City's case. In addition, the retention hearing will allow the court to consider whether less drastic measures than continued impoundment, such as a bond or a restraining order,

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[33] For example, we do not expect that these limited hearings will resemble the sometimes prolonged pretrial hearings that district courts in this Circuit have conducted to address probable cause for the government's seizure of property under federal forfeiture laws. *See, e.g., Names Registry Publ'g*, 68 F.3d at 579 (noting that the district court below had held a two-day pretrial hearing to examine probable cause for an *ex parte* seizure of bank funds under federal forfeiture law); *Daccarett*, 6 F.3d at 45 (three-day pretrial evidentiary hearing to examine probable cause for seizure of electronic transfer funds under federal forfeiture law); *Statewide Auto Parts*, 971 F.2d at 900 (oral argument followed by further written evidentiary submissions on the issue of probable cause to seize real and personal commercial properties under federal forfeiture law); *see also In re Seizure of All Funds in Accounts in Names Registry Publ'g, Inc.*, 887 F. Supp. 435, 449 (E.D.N.Y.) ("[I]f a claimant challenges the validity of a seizure, . . . then the merits of the forfeiture trial are expedited and the government must establish probable cause for the forfeiture prior to the forfeiture trial."), *vacated on other grounds*, 68 F.3d 577 (2d Cir. 1995). Unlike federal forfeiture actions, which often involve complex evidentiary issues, multiple parties and witnesses, and elaborate underlying criminal allegations, actions instituted against vehicle owners under the New York City forfeiture statute typically present relatively discrete, straightforward issues.

would protect the City's interest in the allegedly forfeitable vehicle during the pendency of proceedings.

On remand, in addition to fashioning appropriate relief, the district court should ascertain how many of the named plaintiffs have recovered their vehicles from the Property Clerk and determine whether their claims have thereby been rendered moot.[34] To the extent that mootness may affect the claims of any of the named plaintiffs, the court, in addressing the issue of class certification, should consider whether exceptions to the mootness doctrine preserve the merits of the case for judicial resolution of the unnamed class members' claims.

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[34] At the time of oral argument before this Court, three of the seven named plaintiffs—Jones, Krimstock, and Walters—had recovered their vehicles. Inasmuch as plaintiffs primarily seek relief in the form of a preliminary injunction and class certification, the question arises whether the claims of some plaintiffs have been rendered moot, and this is a question that a court must address *sua sponte*. The Supreme Court has held in some cases, however, that "the termination of a class representative's claim does not moot the claims of the unnamed members of the class. . . . That the class was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction. . . . In such cases, the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution." *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991) (internal quotation marks and citations omitted); *see also Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975) (same); *cf. United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980) ("Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.") (citing *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)); *Comer v. Cisneros*, 37 F.3d 775, 798-99 (2d Cir. 1994) (noting that in some cases in which the claims of named plaintiffs have become moot prior to class certification, "the courts permit the class certification to relate back to the filing of the complaint and hold that the plaintiffs have properly preserved the merits of the case for judicial resolution"); *Robidoux v. Celani*, 987 F.2d 931, 938-39 (2d Cir. 1993) (same).

CONCLUSION

In conclusion, we hold that promptly after their vehicles are seized under N.Y.C. Code § 14-140 as alleged instrumentalities of crime, plaintiffs must be given an opportunity to test the probable validity of the City's deprivation of their vehicles *pendente lite*, including probable cause for the initial warrantless seizure. We remand to the district court to rule on plaintiffs' request to certify their class pursuant to Fed. R. Civ. P. 23, and to formulate, in consultation with the parties, the appropriate injunctive relief needed to redress the constitutional violations examined in this opinion.

Vacated and remanded.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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VALERIE KRIMSTOCK, CHARLES FLATOW, ISMAEL DELAPAZ, CLARENCE WALTERS, JAMES WEBB, MICHAEL ZURLO, and SANDRA JONES, on their own behalf, and on behalf of all other persons similarly situated,

Plaintiffs,

-against-

HOWARD SAFIR, as Commissioner of the New York City Police Department; PROPERTY CLERK, New York City Police Department; and The CITY OF NEW YORK,

Defendants.

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99 Civ. 12041 (MBM)

OPINION AND ORDER

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MICHAEL B. MUKASEY, U.S.D.J.

Section 14-140 of the New York City Administrative Code ("Property Clerk Law") authorizes the Police Department to seize the vehicle of a person arrested for a crime when the vehicle is "suspected of having been used as a means of committing the crime." N.Y.C. Admin. Code § 14-140 (1996). If the Police receive a demand from the vehicle's owner for its return, they must either return it, or the Department's Property Clerk must start a civil forfeiture action within 25 days to obtain ownership of the vehicle. RCNY § 12-36. In this putative class action, plaintiffs, whose vehicles have been seized, sue the City, on behalf of themselves and others similarly situated, under 42 U.S.C. § 1983, on the ground that the forfeiture procedures violate the Due Process Clause of the Fourteenth Amendment. In particular, plaintiffs claim that the "Due Process Clause . . . requires that those persons whose cars are seized by the police and held for forfeiture under the Administrative Code must receive a prompt hearing at which they can challenge the legitimacy and necessity of the impoundment of the car for the duration of the forfeiture case." Plaintiffs claim also that the Due Process Clause requires that "those persons whose cars have been seized and held for forfeiture receive a meaningful

opportunity to be heard in their requests for the assistance of court-appointed counsel in the forfeiture case."

Plaintiffs move for class action certification pursuant to Fed. R. Civ. P. 23, and for a preliminary injunction pursuant to Fed. R. Civ. P. 65, ordering that "unless a person whose automobile is seized and held for forfeiture receives a prompt hearing on the legitimacy and necessity of defendants' continued detention of the car, the vehicle be released to the owner for the pendency of the litigation." Plaintiffs also seek a preliminary injunction ordering that "if a car owner subjected to forfeiture has not had a meaningful opportunity to request court appointed counsel in the case, then the car should be returned to him as its lawful claimant, until the counsel determination is made by a court." The City cross-moves pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the complaint. For the reasons stated below, the motion to dismiss is granted.

I.

For the purpose of deciding the motion to dismiss, the material facts alleged in the complaint are assumed to be true. See Cooper v. Pate, 378 U.S. 546, 546 (1964) (per curiam). The vehicles of six of the seven named plaintiffs -- Valerie Krimstock, Charles Flatow, Ismael Delapaz, Clarence Walters, James Webb, and Michael Zurlo -- were seized after each was arrested for Driving While Intoxicated ("DWI"). (Id. ¶ 9) These six named plaintiffs have all pleaded guilty to the non-criminal violation of driving while impaired. (Id.) The vehicle of the seventh named plaintiff, Sandra Jones, was seized when her husband was arrested for drug and weapon possession; those charges were dismissed. (Id. ¶ 29) The Property Clerk started civil forfeiture proceedings against all seven in the civil part of the New York Supreme Court. (Id. ¶¶ 12, 15, 17, 21, 24, 26, 30) As of December 14, 1999, when the complaint was filed, the forfeiture cases of all seven

plaintiffs were pending, but none had received a hearing, and their vehicles remained in the Property Clerk's custody. (Id. ¶ 10)

II.

Defendants argue that this court should dismiss plaintiffs' complaint because under Younger v. Harris, 401 U.S. 37 (1971) and subsequent cases, federal courts must abstain when exercising jurisdiction would interfere with state criminal proceedings or certain types of state civil proceedings. Defendants contend that hearing plaintiffs' claims here would interfere with the Property Clerk's forfeiture actions. (Def. Mem. at 5) Younger abstention is appropriate when 1) there is an ongoing state proceeding; 2) the proceeding involves important state interests; and 3) the state proceeding provides an adequate opportunity for the plaintiff to raise his constitutional claims. See Phillip Morris, Inc. v. Blumenthal, 123 F.3d 103, 105 (2d Cir. 1997).

State proceedings are ongoing until the parties exhaust their state appellate remedies. See Huffman v. Pursue, Ltd, 420 U.S. 592, 608 (1975). The Property Clerk's forfeiture proceedings were pending in New York Supreme Court when plaintiffs' complaint was filed. Thus, plaintiffs do not suggest that they have exhausted their appellate remedies. Rather, they argue that the forfeiture suits are not ongoing "in any realistic sense" because once plaintiffs answered the Property Clerk's summonses, the Clerk has done nothing to advance the cases. (Pl. Reply Mem. at 15) Plaintiffs fail to provide any legal support for this argument. Moreover, state court defendants can cause the clerk to place a case on the court's trial calendar by filing a note of issue. See N.Y. C.P.L.R. § 3402 (McKinney 1990). Accordingly, the forfeiture proceedings are ongoing.

State proceedings involve an important state interest if they "concern the central sovereign functions of state government." Phillip Morris, Inc., 123 F.3d at 106. Furthermore, a federal court should consider not only the state's interest in the outcome of a particular case, but also the "underlying nature" of that class of cases. Id. The Property Clerk's forfeiture proceedings act to complement and strengthen the state's law enforcement efforts by depriving those who commit dangerous offenses of the means of repeating those offenses. Accordingly, the forfeiture proceedings involve an important state interest.

Finally, federal courts should not abstain unless the state proceeding provides an adequate opportunity to raise constitutional claims. Here, the forfeiture proceedings do adequately permit plaintiffs to claim the due process right to a meaningful opportunity to request court-appointed counsel. Plaintiffs do not disagree that they would be able to raise this claim as individual defendants in the forfeiture proceedings. They argue instead that their individual state court proceedings cannot provide the "broad-based" class relief they request here. (Pl. Reply Mem. at 15-16). In support of that argument, they mistakenly cite La Shawn A. by Moore v. Kelly, 990 F.2d 1319 (DC Cir. 1990). However, in that case, the Court did not deny abstention because the federal suit was a class action. Rather, the Court held narrowly that the state proceedings in the Family Division of the D.C. Courts were "not suitable arenas" for the plaintiffs' federal claims. Id. at 1323-24. Moreover, in Juidice v. Vail, 430 U.S. 327, 331, 337 (1977), the Supreme Court upheld a federal district court's abstention on the ground that each member of a class of judgment creditors had an adequate opportunity to raise constitutional claims in individual state proceedings.

Accordingly, I will abstain from hearing plaintiffs' claim that they have a due process right to a meaningful

opportunity to request court-appointed counsel. Defendants' motion to dismiss is granted with respect to that claim.

The forfeiture proceedings do not, however, provide an adequate opportunity for plaintiffs to claim a due process right to a prompt probable cause hearing. After claimants demand the return of their vehicle, the Property Clerk has 25 days to begin forfeiture proceedings. Thus, plaintiffs would not be able to raise their due process claim for at least 25 days, and even if the state court immediately ruled in plaintiffs' favor on that claim, the time for a prompt probable cause hearing would already have passed. In Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975), the plaintiffs also claimed a due process right to prompt probable cause hearings, in that case after their arrest. The Supreme Court upheld the decision to hear the plaintiffs' claim rather than to abstain under Younger because the "legality of pretrial detention without a judicial hearing . . . could not be raised in defense of the [state] prosecution." Accordingly, I am not required to abstain from hearing plaintiffs' claim that they have a due process right to prompt probable cause hearings.

Defendants argue also that the court should dismiss plaintiffs' complaint because under Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) and subsequent cases, federal courts could, in "exceptional circumstances," abstain when there are concurrent state and federal proceedings. Sheerbonnet, Ltd. v. American Express Bank, 17 F.3d 46, 49 (2d Cir. 1994). Defendants maintain that the concurrent state proceeding here is Grinberg v. Safir, 266 A.D.2d 43, 698 N.Y.S.2d 218 (1st Dep't 1999), in which the plaintiffs claim, inter alia, that the application of the Property Clerk Law to persons arrested for DWI violates the Due Process Clause. I need not consider whether Grinberg warrants abstention under Colorado River because on February 29, 2000, the New

York Court of Appeals dismissed the plaintiff's appeal from the Appellate Division's decision, see Grinberg v. Safir, 94 N.Y.2d 898, 707 N.Y.S.2d 143 (2000), and Grinberg is no longer a "concurrent" proceeding. For the above reasons, I am not required to abstain either under Younger or Colorado River from hearing plaintiffs' claim that they have a due process right to a probable cause hearing.

III.

Defendants argue that the court should, nevertheless, dismiss plaintiffs' claim that they have a due process right to a probable cause hearing because the Property Clerk's existing procedures provide due process. (Def. Mem. at 11) The Fourteenth Amendment's Due Process Clause guarantees that no State shall "deprive any person of life, liberty, or property, without due process of law." That guarantee usually requires that the government provide notice and an opportunity to be heard before a person is deprived of property. See United States v. James Daniel Good Real Property, 510 U.S. 43, 47 (1993). However, the government may postpone the notice and hearing in "extraordinary circumstances." Id. at 53. Plaintiffs acknowledge that it would be "impractical" to provide a hearing before seizing a vehicle in the "typical DWI arrest." (Pl. Mem. at 20) Rather, they argue that due process requires the government to provide them with a prompt probable cause hearing "in a matter of days, not weeks or months." (Id. at 30)

Defendants respond that the Property Clerk's existing procedures have been challenged in the past as violating due process, and the Second Circuit has declared that they were constitutional. (Def. Mem. at 10-11) They cite Butler v. Castro, 896 F.2d 698, 699 (2d Cir. 1990), in which the Court stated that "the actual procedures followed by the City with regard to the disposition of seized items

are constitutionally valid." (Def. Mem. at 10) At least one district court in this Circuit has characterized the Circuit's statement in Butler as affirming the constitutionality of the Clerk's existing procedures. In Leyh v. Property Clerk, 774 F. Supp. 742, 746 (E.D.N.Y. 1991), Judge Glasser said "[t]he Second Circuit has had occasion to review the substance of [the procedures], and the court declared [them] to be 'constitutionally valid.'" Similarly, in a more recent Second Circuit case, Alexandre v. Cortes, 140 F.3d 406, 409 (2d Cir. 1998), the Court referred to the order creating the existing procedures as establishing "constitutional procedures for the disposition of property held by the clerk."

However, the Court in Butler did not examine the hearing provided under the Property Clerk's procedures. Rather, the Court addressed whether the claimant had received notice of the procedures for recovering his vehicle. See Butler, 896 F.2d at 703. The court in Alexandre also addressed a different issue -- whether arrestees received notice and an opportunity to contest the release of their vehicles to lienholders. See Alexandre, 140 F.3d at 413. In neither case was the Second Circuit required to consider whether the hearing provided under the existing procedures provides due process. In addition, when the courts in Butler and Alexandre reviewed the Property Clerk's existing procedures, the Clerk had only 10 days to initiate a forfeiture proceeding; under current regulations, the Clerk has 25 days. RCNY § 12-36. Thus, although I am mindful of these passing approvals of the Clerk's existing procedures, I must nonetheless consider whether the forfeiture proceeding under the existing procedures provides due process.

Plaintiffs contend that the proceeding does not provide due process, because the Second Circuit has held that when the United States Customs Service seizes

vehicles under 19 U.S.C. §§ 1602 et seq., which governs forfeitures for violations of the customs laws, it must provide claimants with a prompt probable cause hearing. In Lee v. Thornton, 538 F.2d 27, 33 (2d Cir. 1976), Customs agents arrested Lee for bringing undeclared people, merchandise, and marijuana into the country and also seized the vehicle he used to transport those items. See id. at 30-31. The agents told Lee that his vehicle could be forfeited but that he had a right to petition Customs for "remission or mitigation" of the forfeiture. Customs would remit or mitigate a forfeiture if the agency found mitigating circumstances. In Lee, Customs mitigated but did not remit the forfeiture of the vehicle, and the plaintiff paid $100 for the return of his car See id.

In general, when Customs does not grant a petition for mitigation, the United States Attorney may sue for forfeiture of the vehicle. See United States v. $8,850, 461 U.S. 555, 557-58 (1983). In Lee, the Court found that the United States Attorney's "condemnation proceedings necessarily consume substantial periods of time," and that "[d]eprivation of means of transportation for such periods requires an opportunity to be heard." Lee, 538 F.2d at 32. The Court held, therefore, that when "vehicles are seized for forfeiture . . . actions on petitions for mitigation or remission should be required within 24 hours," and a "hearing on probable cause for the detention . . . within 72 hours if the petition is not granted in full." Id. at 33.

Although Lee does appear to hold under similar circumstances that due process requires a prompt probable cause hearing, Lee has been implicitly overruled by two subsequent Supreme Court decisions also addressing the forfeiture procedures under 19 U.S.C. §§ 1602 et. seq. In United States v. $8,850, 461 U.S. 555, 555 (1983), Customs seized $8,850 from the claimant when she failed to declare the money upon entering Los Angeles

International Airport. Customs referred the case to the U.S. Attorney who filed a complaint seeking civil forfeiture in federal District Court 18 months later. See id. at 560-61. As one of her defenses to that suit, the claimant argued that the government's "dilatory" commencement of the suit violated her due process right to a hearing at a meaningful time. When her claim reached the Supreme Court, the Court characterized the issue in $8,850 as "when the post-seizure delay may become so prolonged that the dispossessed property owner has been deprived of a meaningful hearing at a meaningful time." Id. at 562-63. The Court then explained that this issue of when the government's delay in initiating a civil forfeiture suit violates the due process right to a hearing is analogous to the issue of when the government's delay violates one's right to a speedy trial. See id. at 564. On the basis of that analogy, the Court then applied the test that it had developed in Barker v. Wingo, 407 U.S. 514 (1972) to resolve the speedy trial issue in order to determine whether Customs' 18-month delay in initiating the forfeiture suit had violated claimant's due process right to a "meaningful hearing at a meaningful time," and held that Customs' delay in instituting civil forfeiture proceedings was reasonable. Id. at 564-69.

Plaintiffs respond that $8,850 does not apply to this case because $8,850 concerns the "time limits within which a federal forfeiture action itself must be initiated," rather than the "timing of the initial post-seizure hearing." (Pl. Reply Mem. at 7) This limited reading of $8850 might be plausible if the Supreme Court itself had not read the case more broadly. Less than three years later the Supreme Court addressed 19 U.S.C. §§ 1602 et seq. again. In United States v. Von Neuman, 474 U.S. 242 (1986), the claimant argued that Customs' 36-day delay in responding to his petition for mitigation or remission violated his right to due process. See Von Neuman, 474 U.S. at 243. The Ninth Circuit had held that due process requires Customs to act

promptly in ruling on petitions for remission or mitigation under 19 U.S.C. §§ 1602 et. seq. See id. at 247. The Supreme Court reversed. The Court explained that due process did not require Customs to act promptly on the petition because "[i]mplicit in this Court's discussion of timeliness in $8,850 was the view that the forfeiture proceeding, without more, provides the postseizure hearing required by due process . . . ." Id. at 249. The Court reiterated this message when it wrote, "we have already noted that [claimant's] right to a forfeiture proceeding meeting the Barker test satisfies any due process right with respect to the car. . . ." Id. at 251. If the due process right to a meaningful postseizure hearing under 19 U.S.C. §§ 1602 et seq. requires only the forfeiture proceeding, it does not also require a probable cause hearing, and the Second Circuit's decision in Lee holding to the contrary must be considered overruled.

Although due process does not requires a probable cause hearing when vehicles are seized under 19 U.S.C. §§ 1602 et seq., it might require a probable cause hearing when vehicles are seized under the Property Clerk Law. The Supreme Court's explanation in Von Neuman that in the Customs cases due process requires only a forfeiture proceeding addressed facts different from those in this case. In this case, for example, claimants' vehicles are seized for driving while intoxicated rather than smuggling; they are seized by local rather than federal law enforcement officers; and the forfeiture proceeding is brought by the Property Clerk rather than a United States Attorney. One or more of the differences between the Customs cases and this case might warrant providing plaintiffs with a probable cause hearing.

To determine whether these differences require providing a probable cause hearing, we consider the three interests the Supreme Court identified in Mathews v.

Eldridge, 424 U.S. 319 (1972) as relevant to deciding whether due process requires an additional safeguard. See United States v. Monsanto, 924 F.2d 1186, 1193 (2d Cir. 1991). In Mathews, the Supreme Court explained that to determine whether due process requires procedural safeguards in addition to those provided, the court must weigh the " 'private interest that will be affected by the official action,' 'the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards;' and lastly, 'the government's interest, including the function involved and the fiscal or administrative burdens that the additional or substitute procedural requirement would entail.'" Id.

The weights of those interests in this case do not require providing plaintiffs with the additional safeguard of a probable cause hearing. The private interest affected by the official action is the same: a person's use of his vehicle. Further, the importance of that interest might be even greater for persons whose vehicles are seized by Customs. They are likely to be stranded at a "remote border point[s] far from their destination," where it would be difficult to find alternative transportation. Lee, 538 F.2d at 33. Under the Property Clerk Law at issue here, vehicles are not seized at a "remote border" location. Indeed, they are seized in a jurisdiction that abounds in mass transit facilities. Similarly, the risk of erroneous deprivation of that interest is based in both cases on the reliability of the same procedure: a probable cause arrest. Plaintiffs do not allege any facts suggesting that the use of that procedure to determine whether a person has committed an offense for which a vehicle would be subject to forfeiture under the Property Clerk Law is unusually unreliable. Plaintiffs also do not allege facts suggesting that a probable cause hearing in drunk driving cases would be more valuable in eliminating the risk of erroneous deprivation that attaches

to the use of probable cause arrests than it would be in other cases, including Customs cases.

The government's interest in both cases is to supplement law enforcement. Analyzing this interest also requires that I consider the fiscal or administrative burden that conducting the probable cause hearing would entail. In Lee, the court found that the cost to the government of conducting probable cause hearings in the Customs cases "would not be great since . . . machinery is readily available and . . . is not in use in [similar] cases." Id. Plaintiffs allege that the Police seized 1,162 vehicles from February to November 1999 for DWI and that this "class of persons is increasing daily." (Comp. ¶37) Therefore, it is likely that the cost of conducting probable cost hearings here would be far more burdensome that the minimal burden described by the Court in the Customs cases.

Because the Mathews interests do not weigh any more in favor of claimants in Property Clerk cases than they do in Customs cases, and because those interests are deemed fully protected in Customs cases by no more than a forfeiture proceeding, see Von Neuman, 474 U.S. at 249, plaintiffs' due process right to a meaningful hearing at a meaningful time does not require the additional safeguard of a probable cause hearing. Accordingly, defendant's motion to dismiss plaintiffs claim that due process entitles them to a prompt post-deprivation probable cause hearing is granted.

* * *

For the reasons stated above, defendants' motion to dismiss plaintiffs' complaint is granted.

SO ORDERED:

Dated: New York, New York
November 13, 2000

/s/ Michael B. Mukasey
Michael B. Mukasey,
U.S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

VALERIE KRIMSTOCK, et.al.,

Plaintiffs,

-against-

HOWARD SAFIR, et.al.,

Defendants.

----------x

99 **CIVIL** 12041 (MBM)

JUDGMENT

FILED NOVEMBER 15, 2000
ENTERED ON THE DOCKET ON NOVEMBER 16, 2000

Plaintiffs having moved for class certification and for preliminary injunction; and the Defendants having moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) and the matters having come before the Honorable Michael B Mukasey, United States District Judge, and the Court on November 13, 2000, having rendered its Opinion (84803) and Order granting defendants' motion to dismiss and dismissing the complaint, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion (84803) and Order dated November 13, 2000, defendants' motion to dismiss the complaint is granted and the complaint is dismissed.

Dated: New York, New York
November 15, 2000

James M. Parkison

Clerk of the Court

BY: /s/ Deputy Clerk
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th Day of October, two thousand two.

VALERIE KRIMSTOCK, CHARLES FLATOW, ISMAEL DELAPAZ, CLARENCE WALTERS, JAMES WEBB, MICHAEL ZURLO, SANDRA JONES, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

v.

HOWARD SAFIR, in his official capacity as Commissioner of the New York City Police Department, PROPERTY CLERK, NEW YORK CITY POLICE DEPARTMENT and THE CITY OF NEW YORK,

Defendants-Appellees.

Docket Nos. 00-9488

FILED OCTOBER 28, 2002

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the defendants-appellees.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the Court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE

By: /s/ Arthur Heller
Arthur Heller,
Administrative Attorney

STATUTORY PROVISIONS

United States Constitution

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

United States Code

Title 42 The Public Health and Welfare

Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subject, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. for the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Administrative Code of the City of New York

Title 14 Police

Chapter 1 Police Department

Section 14-140 Property Clerk.

* * *

b. Custody of property and money. All property or money taken from the person or possession of a prisoner, all property or money suspected of having been unlawfully obtained or stolen or embezzled or of being the proceeds of crime or derived through crime or derived through the conversion of unlawfully acquired property or money or derived through the use or sale of property prohibited by law from being held, used or sold, all property or money suspected of having been used as a means of committing crime or employed in aid or furtherance of crime or held, used or sold in violation of law, all money or property suspected of being the proceeds of or derived through bookmaking, policy, common gambling, keeping a gambling place or device, or

any other form of illegal gambling activity and all property or money employed in or in connection with or in furtherance of any such gambling activity, all property or money taken by the police as evidence in a criminal investigation or proceeding, all property or money taken from or surrendered by a pawnbroker on suspicion of being the proceeds of crime or of having been unlawfully obtained, held or used by the person who deposited the same with the pawnbroker, all property or money which is lost or abandoned, all property or money left uncared for upon a public street, public building or public place, all property or money taken from the possession of a person appearing to be insane, intoxicated or otherwise incapable of taking care of himself or herself, that shall come into the custody of any member of the police force or criminal court, and all property or money of inmates of any city hospital, prison or institution except the property found on deceased persons that shall remain unclaimed in its custody for a period of one month, shall be given, as soon as practicable, into the custody of and kept by the property clerk except that vehicles suspected of being stolen or abandoned and evidence vehicles as defined in subdivision b of section 20-495 of the code may be taken into custody in the manner provided for in subdivision b of section 20-519 of the code.

* * *

e. Disposition of property and money. 1. Abandoned vehicles subject to the provisions of section twelve hundred twenty-four of the vehicle and traffic law in the custody of the property clerk shall be disposed of in accordance with the provisions of such section twelve hundred twenty-

four. The city may convert to its own use in any calendar year one percent of any such abandoned vehicles not subject to subdivision two of such section twelve hundred twenty-four which are not claimed. All moneys or property other than abandoned vehicles subject to the provisions of such section twelve hundred twenty-four that shall remain in the custody of the property clerk for a period of three months without a lawful claimant entitled thereto shall, in the case of moneys, be paid into the general fund of the city established pursuant to section one hundred nine of the charter, and in the case of property other than such abandoned vehicles, be sold at public auction after having been advertised in "the City Record" for a period of ten days and the proceeds of such sale shall be paid into such fund. In the alternative, any such property may be used or converted to use for the purpose of any city, state or federal agency, or for charitable purposes, upon consultation with the human resources administration and other appropriate city agencies, and the commissioner shall report annually to the city council on the distribution of such property. Notwithstanding the foregoing, all property or money of a deceased person that shall come into the custody of the property clerk shall be delivered to a representative of the estate of such decedent and if there be no such representative, to the public administrator of the county where the decedent resided. Where moneys or property have been unlawfully obtained or stolen or embezzled or are the proceeds of crime or derived through crime or derived through the conversion of unlawfully acquired property or money or derived through the use or sale of property prohibited by law from being held, used or sold, or have been used as a means of

committing crime or employed in aid or in furtherance of crime or held, used or sold in violation of law, or are the proceeds of or derived through bookmaking, policy, common gambling, keeping a gambling place or device, or any other form of illegal gambling activity or have been employed in or in connection with or in furtherance of any such gambling activity, a person who so obtained, received or derived any such moneys or property, or who so used, employed, sold or held any such moneys or property or permitted or suffered the same to be used, employed, sold or held, or who was a participant or accomplice in any such act, or a person who derives his or her claim in any manner from or through any such person, shall not be deemed to be the lawful claimant entitled to any such moneys or property except that as concerns any vehicle taken into custody in the manner provided for in subdivision b of section 20-519 of the code, the authorized tow company shall receive from the department the cost of towing and storage as provided under subdivision c of section 20-519.

Rules of the City of New York

Title 38 Police Department

Chapter 12 Return of Property From Property Clerk

Subchapter B Procedures Relating to Property Taken or Obtained in Connection With an Arrest

Section 12-36 Property Clerk Forfeiture Proceedings. When the property clerk has reasonable cause to believe that property was unlawfully obtained or was the proceeds

or instrumentality of a crime or otherwise may be subject to forfeiture under any applicable provision of law, the property clerk may refuse to return the property and may cause a civil forfeiture proceeding or other similar civil proceeding to be initiated in accordance with the following:

(a) Such proceeding may, subject to the time limitations below, be instituted either before or after a claimant makes a demand to the property clerk for the return of the property. If such proceeding is instituted before the termination of criminal proceedings against the claimant, this subchapter shall not be construed to effect any right of a party to the forfeiture proceeding to have the forfeiture proceeding stayed for such period as the court may determine. If a timely demand is made for the return of the property before the forfeiture proceeding is instituted, such proceeding shall be brought no later than (1) in the case of arrest evidence, 25 days after the claimant provides the property clerk with a district attorney's release, and (2) in all other cases, as a district attorney's release is not required, within 25 days after the date of demand. If such proceeding is not commenced within this time period, the property clerk shall give written notice to the claimant or the claimant's representative, at his or her last known address, which may be the address of a correctional facility, that the property will be returned forthwith to that person. Property that remains unclaimed for a period of 120 days after the

date of such notice may be disposed of by the property clerk according to law.

(b) Notice of commencement of a forfeiture proceeding by the property clerk shall include a statement of the grounds upon which the property clerk seeks to justify the continued retention of the property. Any such proceeding shall provide the claimant and other interested persons with an adequate opportunity to be heard within a reasonable period of time. In any such proceeding the property clerk shall bear the burden of proving by a preponderance of the evidence that the property clerk is legally justified to continue to retain the property.

* * *

(2)

No. 02-1149

Supreme Court, U.S.
FILED
MAY 29 2003
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2002

RAYMOND KELLY, in his official capacity as Commissioner of the New York City Police Department; PROPERTY CLERK, New York City Police Department; and the CITY OF NEW YORK,

Petitioners,

- v. -

VALERIE KRIMSTOCK, CHARLES FLATOW, ISMAEL DELAPAZ, CLARENCE WALTERS, JAMES WEBB, MICHAEL ZURLO, AND SANDRA JONES, individually and on behalf of all other persons similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

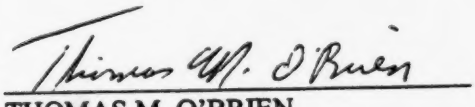
TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUDGES OF THE SUPREME COURT OF THE UNITED STATES

21 pp

Respondent Valerie Krimstock asks leave to file the attached Brief in Opposition to the Petition for a Writ of Certiorari and to proceed in this case in forma pauperis. In both the District Court and the Court of Appeals, Respondents were allowed to proceed as poor persons and were represented by The Legal Aid Society of the City of New York. Respondent Valerie Krimstock's affidavit in support of this application is attached.

Dated: Brooklyn, New York
May 29, 2003

Respectfully submitted,



THOMAS M. O'BRIEN

The Legal Aid Society
Criminal Defense Division
Brooklyn, New York 11201
(718) 243-6806
Counsel for Respondents

No. 02-1149

IN THE
SUPREME COURT OF THE UNITED STATES

Raymond KELLY, et al. - Petitioners

v.

Valerie KRIMSTOCK, et al. - Respondents

AFFIDAVIT IN SUPPORT OF A MOTION TO PROCEED *IN FORMA PAUPERIS* UPON AN OPPOSITION TO A TO A PETITION FOR A WRIT OF CERTIORARI

STATE OF PENNSYLVANIA)
)SS:
COUNTY OF ALLEGHENY)

I, Valerie Krimstock, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am Respondent in this case.

2. I am unable to pay the costs of this case or to give security.

3. The Respondents were previously granted leave to proceed *in forma pauperis* in the United States District Court for the Southern District of New York on December 14, 1999. We were represented by the Legal Aid Society of New York City.

4. I further swear that the responses which I have made to the questions and instructions below relating to my ability to

pay the cost of proceeding in this Court are true.

5. I am currently employed as a medical records technician at the Oncology Hematology Association of Pittsburgh, where I earn approximately $19,000/yr.

6. Within the past twelve months, I have not received any other income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends or other sources.

7. I have no savings account and a small checking account.

8. I own no real estate, stocks, bonds, notes or other valuable property, excluding household furnishings and clothing. I drive a 1995 car.

9. There are no persons who are currently dependent on me for support.

10. I declare under penalty of perjury that the foregoing is true and correct.

Valerie Krimstock
VALERIE KRIMSTOCK

Duly witnessed and
sworn to before me
a Notary Public, this
19 day of May, 2003

Notarial Seal
Sharon E. Garvin, Notary Public
Bellevue Boro, Allegheny County
My Commission Expires July 13, 2004
Member, Pennsylvania Association of Notaries

No. 02-1149

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2002

RAYMOND KELLY, in his official capacity as Commissioner of the New York City Police Department; PROPERTY CLERK, New York City Police Department; and the CITY OF NEW YORK,

Petitioners,

- v. -

VALERIE KRIMSTOCK, CHARLES FLATOW, ISMAEL DELAPAZ, CLARENCE WALTERS, JAMES WEBB, MICHAEL ZURLO, AND SANDRA JONES, individually and on behalf of all other persons similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS M. O'BRIEN
(Counsel of Record)
The Legal Aid Society
Criminal Defense Division
111 Livingston Street, 10th Floor
Brooklyn, New York 11201
(718) 243-6806
Attorney for Respondents

May 29, 2003

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether this Court should grant Certiorari to review a ruling of the Second Circuit that individuals whose cars have been seized and impounded by the police for allegedly being used in the commission of a crime have a right under the Fourth and Fourteenth Amendments to a prompt post-seizure opportunity to be heard to challenge the probable validity of the seizure and the necessity of the impoundment of the car for the duration of a civil forfeiture action initiated by the Police Department.

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No. 02-1149

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2002

RAYMOND KELLY, in his official capacity as Commissioner of the New York City Police Department; PROPERTY CLERK, New York City Police Department; and the CITY OF NEW YORK,

Petitioners,

- v. -

VALERIE KRIMSTOCK, CHARLES FLATOW, ISMAEL DELAPAZ, CLARENCE WALTERS, JAMES WEBB, MICHAEL ZURLO, AND SANDRA JONES, individually and on behalf of all other persons similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents submit this Brief in opposition to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

The synopsis of the lower court proceedings presented in the Petition is accurate. Respondents provide this brief summary in order to supply a more informative factual context, which is necessary to an understanding of the proper legal issues at this stage of the case.

Respondents are vehicle owners whose cars were seized by Petitioner New York City Police Department in March, April, and May, 1999. Six of the Respondents were charged with the crime of Driving While Intoxicated (DWI). None had ever been arrested before. The seventh, Sandra Jones, was not charged with any crime; her estranged husband, who had borrowed the car, was charged with gun and drug possession.

Each seized car was transferred to the police pound within days of arrest. Between three weeks and two months later, Petitioner Property Clerk of the New York City Police Department commenced civil lawsuits seeking forfeiture of each vehicle, pursuant to the local Administrative Code allowing the police to keep any property that was "used" in the commission of a "crime." The Police Department had regularly impounded cars on the allegation that they were used in the crimes of drug or gun possession, or solicitation of prostitution. The program was dramatically expanded in February, 1999, when the police announced that they would seize and impound any vehicle that was driven by a person arrested for DWI.

When the instant case was filed in December 1999, all of Respondents' cars remained in the police pound. Seven to nine months had passed since the original seizures. Each criminal case had concluded months before. The six Respondents who had been charged with DWI had pleaded to the lesser offense of Driving While Ability Impaired, which is a violation, not a crime. See

Vehicle and Traffic Law §1192(1). The gun and drug charges against Ms. Jones's husband had been dismissed.

Under the local law, there was no procedure available to challenge the impoundment of a vehicle pending a prospective or actual forfeiture action. Respondents brought this class action to obtain a declaratory judgment that due process required a prompt hearing after seizure at which the vehicle owner could challenge the legitimacy and the necessity of the impoundment of his or her car throughout the life of the forfeiture proceeding.

Respondents made no challenge with respect to the timeliness of the forfeiture actions brought against them. They did not contest the 25-day time limit within which local rules permit the police to institute a forfeiture action, nor did they challenge the length of time it took to conclude the forfeiture action in their cases. The purpose of the federal lawsuit was to obtain a meaningful procedural opportunity to challenge the impoundment of a vehicle pendente lite.

The Second Circuit agreed with Respondents that "their inability to challenge, promptly after the vehicles are seized, the legitimacy of and justification for the City's retention of the vehicles prior to judgment in any civil forfeiture proceeding violates their constitutional rights." (Petition at A3)

The ruling did not restrict the ability of the police to seize vehicles. Nor did it impose a different time limit for the police to institute a forfeiture action, or to prosecute the forfeiture case. The decision's "primary focus," rather, was the "continued retention" of vehicles after the original seizure and before the conclusion of the forfeiture action: "It is this intermediate deprivation, lasting months or sometimes years without any prompt hearing before a neutral fact-finder, that we deem constitutionally infirm." (Petition at A10)

The decision took note of the deprivations experienced by some Respondents. Respondent Sandra Jones, who had not been arrested or charged with any crime, suffered ten months' deprivation before the Property Clerk returned her van. During that period, she had continued to make $428.06 in monthly payments on her impounded vehicle. Valerie Krimstock did not achieve return of her car until 15 months after seizure, when a judge dismissed the forfeiture case. She had continued to make monthly payments of $273 during the impoundment period. The car of Clarence Walter was not released until he prevailed in his forfeiture case more than two years after the car was seized. (Petition at A7-8) Yet none of these individuals had had an opportunity to challenge the prolonged impoundment of their vehicles pendente lite.

Accordingly, the Court of Appeals decided that, since "[a] car or truck is often central to a person's livelihood or daily activities," a person whose vehicle is impounded "must be permitted to challenge the City's continued possession of his or her vehicle during the pendency of legal proceedings where such possession may ultimately prove improper and where less drastic measures than deprivation pendente lite are available and appropriate." (Petition at A3) "We reach this conclusion," the Court noted, "in light of the dictates of the Fourth and Fourteenth Amendments." (Petition at A10)

REASONS FOR DENYING THE WRIT

A. No Meaningful Conflict Among Appellate Courts

There is no meaningful conflict in the Circuits on the issue decided by the Second Circuit in this case: the right to an early hearing to challenge police impoundment of a vehicle for the life

of a forfeiture lawsuit. With one exception, none of the cases cited by Petitioners addresses this issue. (Petition at 14-15) As the parenthetical descriptions in the Petition make plain, all those cases involve Barker v. Wingo speedy trial challenges to the delays in initiating the forfeiture proceedings. The issue of the post-seizure retention of the vehicle pendente lite was simply not present in those cases.

The sole exception is Jones v. Takaki, 38 F.3d 321 (7th Cir. 1994). In that case, the vehicle owners sought a preliminary determination of probable cause. Dismissing their argument, the opinion stated that "the forfeiture proceeding itself" was "the only hearing to which they are constitutionally entitled." Id. at 324. As authority for that proposition, the Court noted: "We need look no further than the Supreme Court's decision in United States v. Von Neumann...." Id. (emphasis supplied)

The "We need look no further" admission indicates the fatal flaw in the opinion. The panel did not consider this Court's decision in United States v. James Daniel Good Real Property, 510 U.S. 43 (1993), which had been issued the previous year. In that case, of course, this Court upheld the due process right to a preliminary hearing to challenge the seizure of property in a forfeiture action. The decision cited Von Neumann, noting that a preseizure hearing is not required for an automobile seized at the border. Id. at 57. By implication, a prompt post-seizure hearing would be required, since the Court stressed that any forfeiture action coming many months later would be too late to redress the harm caused by an erroneous seizure. Id at 56.

In any case, the Jones v. Takaki panel's failure to address the key Supreme Court case on the preliminary hearing issue disqualifies that decision from exemplifying a Circuit conflict. James

Daniel Good plainly looms over this case, as the Petition's devotion of two pages in an attempt to distinguish it demonstrates. (Petition at 22-3) As of yet, the Krimstock case is the only decision of a Circuit court to rule on the issue of a post-seizure hearing in a vehicle forfeiture context in light of James Daniel Good. The Jones v. Takaki panel simply missed the key case. In the absence of any conflict in the Circuits on the applicability of James Daniel Good in the vehicle forfeiture setting, it would be premature and unnecessary for this Court to rule on the issue.

In addition to the absence of a genuine conflict in the Circuits, no New York appellate court has ruled on the post-seizure issue presented here. Petitioners cite Property Clerk v. McDermott, 185 AD2d 134 (1st Dept. 1992) as upholding the "constitutionality" of New York City's Administrative Code, but no specific constitutional challenge is even mentioned in that opinion, which concerned purely trial evidentiary questions. (Petition at 21)

Petitioners place heavy reliance on Grinberg v. Safir, 266 AD2d 43 (1st Dept. 1999), in which an intermediate appellate court did briefly address some constitutional issues, although not the one in this case. The court made the unremarkable statement that it did not violate due process to seize an automobile for DWI without a pre-seizure hearing. Id. at 44. Consequently, the New York Court of Appeals' dismissal of Grinberg's appeal, 94 NY2d 898, has no significance for this case, although Petitioners attempt to present the order dismissing the appeal as an implicit opinion on the issue in this case. (Petition at 22 n.4)

Nor is the Court of Appeals' decision in conflict with its own precedent in Butler v. Castro, 896 F.2d 698 (2d Cir. 1990), as Petitioners contend. (Petition at 19) Butler v. Castro solely involved a due process issue of inadequate notice. The phrase "constitutionally valid" in the opinion referred only to the notice procedures at issue there. Id. at 699.

Butler v. Castro thus has nothing to do with this case. And, even if it did, it is untrue to assert that "the 25-day time limitation" for filing suit "was held constitutional by it," since a 10-day limit was in effect at the time that case was decided. See Butler v. Castro, 896 F.2d at 701 n.1. The 25-day limit was not put in place until later. See Petition at A59. Besides, the 25-day time limit for initiating a forfeiture action has never been at issue in this case, despite the emphasis placed on it by Petitioners. The centrality of this misapprehension to their Question Presented only accentuates the inappropriateness of this case for a grant of Certiorari.

B. The Second Circuit Decision Properly Applies This Court's Rulings

When the smoke of spurious conflicts is cleared away, it becomes apparent that the Petition for Certiorari is little more than an appeal to this Court to take this case to correct a purported error by a Court of Appeals in applying this Court's precedents in the peculiar factual setting of a single locality. In any case, the Petition's argument is founded on a misapplication of this Court's limited rulings in United States v. $8,850, 461 U.S. 555 (1983) and United States v. Von Neumann, 474 U.S. 242 (1986), and reflects an inability to distinguish the more recent, and pertinent, case of United States v. James Daniel Good Real Property, 510 U.S. 43 (1993).

The first case, United States v. $8,850, 461 U.S. 555 (1983), concerned a different issue than the initial hearing issue presented in this case. United States v. $8,850 set down a speedy trial standard for federal forfeiture actions. It did not concern the right to an initial hearing, but only the broad time limits within which a federal forfeiture action must be commenced.

The property claimant there, unlike Respondents, sought to dismiss the case as untimely. This Court held that dismissal was not required because the government had shown diligence and

given reasonable explanations for the 18-month delay. Id. at 569. It applied the four-part speedy trial test for criminal cases of Barker v. Wingo, 407 U.S. 514 (1972). Of course, that speedy trial right coexists in every criminal case with the right to a prompt initial hearing set out in Gerstein v. Pugh, 420 U.S. 105 (1975) and County of Riverside v. McLaughlin, 500 U.S. 44 (1991) (arrestee can challenge detention within 48 hours of arrest). That is the right vindicated in this case in the car seizure context. Respondents sought a declaration of their right to an initial hearing to challenge impoundment. They did not seek dismissal of their forfeiture cases on speedy trial grounds.

The claimant in $8,850 had not used any of the available remedies that would have afforded him an "early judicial hearing." 461 U.S. at 569. Among those remedies was a motion under Federal Rule of Criminal Procedure 41(e) for return of seized property. Id. Rule 41(e) provides for a judicial hearing whenever a person subjected to "deprivation of property" by a federal officer seeks return of the property. There is no analogue to this early opportunity to regain use of property in New York City's Administrative Code forfeiture regime.

It is thus noteworthy that this Court set the speedy trial forfeiture standard in a setting where an early judicial hearing on return of the property was already available. Even if a trial on the ultimate question of legal entitlement to the property was months away, the property owner in a federal action had early access to a judicial forum to regain use of the property during the pendency of the litigation.

To support their argument that United States v. $8,850 rules out any initial hearing where a car is seized for forfeiture, Petitioners quote part of sentence from United States v. Von Neumann, 474 U.S. 242, 249 (1986), which said "[i]mplicit in this Court's discussion of timeliness in $8,850

was the view that the forfeiture proceeding, without more, provides the postseizure hearing required by due process...." (Petition at 5, 13, 14) The elided end of the sentence states, "to protect Von Neumann's property interest in the car." Id. at 249.

Respondents' ultimate "property interest" in their cars is not the issue in this case; the issue is their right to an initial hearing regarding interim relief. That initial proceeding would not end the case. Von Neumann, like $8,850, did not deal with any such initial hearing regarding interim relief. Neither seizure nor retention of the car was an issue in the case. Von Neumann's car had been released to him within two weeks of its seizure by customs officials. 474 U.S. at 245-46. As did the claimant in $8,850, Von Neumann sought a definitive ruling in his favor based on a timeliness challenge that would terminate the government's claim.

Von Neumann's claim was that the Custom Service's 36-day delay in ruling on his remission petition violated due process and required cancellation of the $3,600 penalty it had imposed for failing to declare his foreign car at the border. This Court rejected his claim, noting that "his right to a forfeiture proceeding meeting the Barker test satisfies any due process right with respect to the car and the money." Von Neumann had not shown that a 36-day delay in the "disposition of his remission petition" deprived him of due process. Id. at 251. The remission petition, which "terminates the dispute," (id. at 249-50 n.8) was subject to the same speedy trial criteria as the trial on the merits.

The initial hearing to contest the custody of the car pending the litigation on the merits -- the only issue in this case -- was simply not an issue in Von Neumann, which dealt with the time limits of the "forfeiture proceeding" that would eventually decide the ultimate issue. Petitioners fail to recognize the salient distinction between the prompt initial hearing to contest the restraint of

property and the ultimate forfeiture proceeding itself. Their assertion that "in seeking a prompt, post-seizure hearing before the resolution of the forfeiture actions, plaintiffs are necessarily challenging the length of time within which the City may constitutionally commence its forfeiture action...." is simply a non-sequitur. (Petition at 18-19) (emphasis supplied)

Any doubt about the dual requirements in a forfeiture case -- a prompt initial hearing to challenge a seizure of property and an ultimate trial on the merits of forfeiture -- was settled by this Court in United States v. James Daniel Good Real Property, 510 U.S. 43 (1993). Most of the majority opinion discussed why the initial hearing was required by due process. The hearing's basic purpose " 'is to protect [the] use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property....' " Id. at 53. (citation omitted)

Although Good's property interest at stake ($900 in monthly rent from tenants renting his home) necessitated a hearing before seizure, the Court made clear that even a hearing that was postponed until after seizure must come promptly in order to satisfy due process. "Given the congested civil dockets in federal courts," the Court noted, the "ultimate judicial decision" on forfeiture might not come "until many months after seizure," and " 'would not cure the temporary deprivation that an earlier hearing might have prevented.' " Id. at 56, citing Connecticut v. Doehr, 501 U.S. 1, 15 (1991).

This Court in Good also put the separate questions of the initial hearing and the timeliness of the forfeiture trial in clear relief. The hearing was the "principal question." A "second issue," the Court stated at the outset, was "the timeliness of the forfeiture action." 510 U.S. at 46. It dealt with this "second issue" in a separate section at the end of the opinion. Good, like the money

claimant in U.S. v. $8,850, sought to dismiss the forfeiture action against his property on the grounds that it was untimely. The Court, citing $8,850 among other cases, ruled that dismissal was not required. Id. at 65.

Clearly, the initial hearing and the ultimate proceeding on the merits are separate rights. The contention of Petitioners that $8,850 and Von Neumann rule out an initial hearing and that due process requires only a trial is incompatible with the holding and reasoning of James Daniel Good.

Petitioners attempt to deflect the force of James Daniel Good by arguing that an early hearing is required only where the property seized is real property. (Petition at 22-3) That decision, however, made no such restriction on the right to procedural due process. The nature of the property affects only whether the initial hearing comes before or immediately after seizure, not whether there is a right to an initial hearing to challenge the deprivation. The Court was concerned with the dangers inherent in ex parte seizure of property, not with limiting the opportunity to be heard to a special class of property owners.

"The practice of ex parte seizure," the Court stressed, "creates an unacceptable risk of error." Id. at 55. An initial hearing is the means to correct that error at a meaningful time. The Court explicitly distinguished between "the ultimate judicial action" in the forfeiture action and the "earlier hearing" to challenge the seizure. Id. at 56. The later hearing, coming "many months after the seizure," was insufficient due process because it would not cure the error of the "temporary deprivation that an earlier hearing might have prevented." Id. (citation omitted)

This Court's emphasis on an initial hearing to raise the issue of the custody of any seized property during the pendency of a litigation has ample support in its precedents. In Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), for example, the Court permitted a state procedure by which

a creditor could sequester disputed property without prior notice only because the debtor was protected by "an adversary hearing which will be immediately available in any event." Id. at 618 (emphasis supplied) On the issue of "possession pending trial" -- the same issue as here -- the Court concluded that it satisfied due process "to permit the initial seizure on sworn ex parte documents, followed by an early opportunity to put the creditor to his proof." Id. at 609.

In North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), the Court struck down a Georgia law that allowed garnishment of a bank account pending litigation over a debt. The absence of an early hearing on the deprivation of the bank account violated due process. "Here, a bank account...was impounded, and...put totally beyond use during the pendency of the litigation...without notice or opportunity for an early hearing and without participation by a judicial officer." Id. at 606 (emphasis supplied) Due process required "an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment. Id. at 607.

As the Court summarized in 1976: "This Court has recently and repeatedly held that, at least where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing, at which some showing of the probably validity of the deprivation must be made. Commissioner of Internal Revenue v. Shapiro, 424 U.S. 614, 629 (1976) (emphasis supplied) (citations omitted)

Petitioners' attempt, therefore, to confine the due process requirements enunciated in James Daniel Good to real property and to rule out an initial hearing for other property seized for forfeiture is contradicted by the language of the decision itself, as well as by this Court's most relevant due process precedents.

CONCLUSION

Petitioners have shown no meaningful conflict among Circuit courts on the post-seizure hearing issue, nor between New York appellate courts and the decision in this case. The Second Circuit's ruling was a correct application of this Court's precedents. For these reasons, the Petition for a Writ of Certiorari should be denied.

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